

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

Misty Blanchette Porter )  
 )  
 )  
v. ) Case No. 2:17-cv-194  
 )  
 )  
Dartmouth-Hitchcock Medical )  
Center, et al. )  
 )  
\_\_\_\_\_ )

RE: Day 11 of Jury Trial, Charge Conference

DATE: April 7, 2025

LOCATION: Burlington, Vermont

BEFORE: Honorable Kevin J. Doyle  
Magistrate Judge

**APPEARANCES:**

Geoffrey J. Vitt, Esq.  
Sarah H. Nunan, Esq.  
Vitt & Nunan, PLC  
8 Beaver Meadow Road  
Norwich, VT 05055

Eric D. Jones, Esq.  
Langrock, Sperry & Wool  
210 College Street, Suite 400  
Burlington, VT 05410

Donald W. Schroeder, Esq.  
Morgan McDonald, Esq.  
Foley & Lardner, LLP  
111 Huntington Avenue, Suite 2500  
Boston, MA 02199

- Continued on Next Page -

1 Tristram J. Coffin, Esq.  
Downs Rachlin Martin, PLLC  
2 199 Main Street, Suite 600  
3 Burlington, VT 05401-8339  
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9 TRANSCRIBED BY: Sunnie Elizabeth Donath, RMR  
United States District Court Reporter  
10 *verbatim@vermontel.net*  
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1 (The hearing began at 1:03 p.m.)

2 COURTROOM DEPUTY: Your Honor, the matter before the  
3 Court is Civil Case Number 17-cv-194, Misty Blanchette Porter  
4 versus Dartmouth-Hitchcock Medical Center, et al. Present on  
5 behalf of the plaintiff are Attorneys Geoffrey Vitt and Eric  
6 Jones. Present on behalf of the defendants are Attorneys  
7 Tristram Coffin, Morgan McDonald, and Donald Schroeder. We are  
8 here for a charge conference.

9 THE COURT: Good afternoon. Nice to see everyone  
10 again. Okay. So, turning to the charge conference, so just  
11 kind of for your knowledge, I've kind of set aside about 90  
12 minutes. I'm hoping that that should be enough to get through  
13 this. So let's start with the actual charge, of course, and  
14 particularly the "General Instructions" beginning on Page 1.  
15 I'll just go through kind of what I'll call, you know, the more  
16 general charges that this court issues in pretty much every  
17 case just to make sure that people are okay with that for the  
18 record.

19 So, in terms of Page 1 as well as leading onto Page 2,  
20 "Jurors as Finders of Fact/Rulings of the Court", do plaintiffs  
21 have any comments or objections to those?

22 ATTORNEY JONES: No objection.

23 THE COURT: Okay. Defendants?

24 ATTORNEY COFFIN: No, Your Honor.

25 THE COURT: Okay. "Sympathy/Prejudice" is the next

1 category, as well as "Evidence in the Case". Plaintiffs have  
2 any objections to that?

3 ATTORNEY JONES: No objection.

4 THE COURT: Okay. And defendants?

5 ATTORNEY COFFIN: No, Your Honor.

6 THE COURT: All right. Page 3,  
7 "Arguments/Statements/Objections of the Attorneys", "Court's  
8 Rulings on Objections", and "Evidence: Direct or  
9 Circumstantial", does plaintiff have any objections?

10 ATTORNEY JONES: No, Your Honor.

11 THE COURT: Okay. And defendants?

12 ATTORNEY COFFIN: No.

13 THE COURT: Okay. On Page 4, "Credibility of  
14 Witnesses", plaintiff, any objections to that charge?

15 ATTORNEY JONES: No.

16 THE COURT: And defendants?

17 ATTORNEY COFFIN: No, Your Honor.

18 THE COURT: On Page 5, "Impeachment of a Witness",  
19 plaintiff, any objections to that?

20 ATTORNEY JONES: No, Your Honor.

21 THE COURT: And defendants?

22 ATTORNEY COFFIN: No.

23 THE COURT: Okay. Page 6, "Expert Witnesses", any  
24 objections from the plaintiff?

25 ATTORNEY JONES: None.

1 THE COURT: And defendant?

2 ATTORNEY SCHROEDER: Just a minor edit, Your Honor,  
3 and, if it pleases the Court on this one, we've got our red  
4 lines that we actually did so that, to the extent that they  
5 would be beneficial to the Court to understand our position on  
6 a few things.

7 THE COURT: Do you mean red lines with law or just  
8 kind of a proposed --

9 ATTORNEY SCHROEDER: Just proposed red lines of your  
10 instructions. We just figured that was the most efficient way  
11 to do it if you --

12 THE COURT: Okay. Well, let's see how it works if  
13 you just explain to me what your proposals are.

14 ATTORNEY SCHROEDER: Sure. I would just say in the  
15 first line it would be better read to say, "You may have heard  
16 from one witness -- you have heard from one witness, Dr. Robert  
17 Bancroft, who was presented by Dr. Porter as an expert  
18 witness". I don't think saying "who was known as an expert  
19 witness" is necessarily appropriate. So this is more of a  
20 proposed revision.

21 THE COURT: Okay.

22 ATTORNEY SCHROEDER: That's it on that one.

23 THE COURT: That's it? Okay. Plaintiff, any  
24 objection to that proposed change?

25 ATTORNEY JONES: No. That would be acceptable.

1 THE COURT: Okay, all right. And then the next  
2 charge, "Number of Witnesses", plaintiff, any objection?

3 ATTORNEY JONES: No, Your Honor.

4 THE COURT: And defendant?

5 ATTORNEY SCHROEDER: No, Your Honor.

6 THE COURT: Okay. The next category, "Personal  
7 Knowledge and Experience of Jurors", plaintiff, any objection  
8 to that?

9 ATTORNEY JONES: No.

10 THE COURT: Okay. And defendants?

11 ATTORNEY SCHROEDER: None.

12 THE COURT: Page 7, "Burden of Proof: Preponderance  
13 of the Evidence", any objections, plaintiff?

14 ATTORNEY JONES: No.

15 THE COURT: And defendants?

16 ATTORNEY SCHROEDER: Your Honor, minor comments. At  
17 the -- so I would just go through them very quickly. At the  
18 bottom, "If you find that the credible" -- it's the last  
19 paragraph, "If you find that the credible evidence on an issue  
20 is evenly divided between the parties, you must decide that  
21 issue", I would just say "against Dr. Porter", because it is  
22 her burden, instead of just "the party having the burden of  
23 proof".

24 THE COURT: Okay.

25 ATTORNEY SCHROEDER: The same, just inserting

1 "Dr. Porter" instead of "he or she", and then at the end of the  
2 second full paragraph on Page 8 --

3 THE COURT: And where is that, "he or she"?

4 ATTORNEY SCHROEDER: I'm sorry. Right at the top,  
5 Your Honor, of Page 8, "simple equality of the evidence, he or  
6 she", I would just put "Dr. Porter". And the first full  
7 paragraph would suggest language at the end that says, "You  
8 must find for Dartmouth Health on those claims", period.

9 THE COURT: Okay. Where exactly are you in that  
10 section?

11 ATTORNEY SCHROEDER: Sure. Oh, I'm looking at Page 8  
12 before "Corporation Acts Through Its Employees".

13 THE COURT: Yes.

14 ATTORNEY SCHROEDER: I would request, respectfully  
15 request, "You must find for Dartmouth Health on those claims",  
16 at the end of that paragraph, just inserting the words "on  
17 those claims".

18 THE COURT: Oh, okay. Just so I'm clear, so on Page  
19 7 at the bottom of that line, are defendants proposing that the  
20 second clause of that sentence read, "You must decide that  
21 issue against Dr. Porter", period, and then the next sentence,  
22 "That rule follows from the fact that the party bearing this  
23 burden must prove more than simple equality of evidence: Dr.  
24 Porter must prove the element at issue"?

25 ATTORNEY SCHROEDER: Yes, Your Honor.

1 THE COURT: And then the final sentence of that  
2 section, the final clause, "Then Dr. Porter has failed to  
3 sustain her burden, and you must find for Dartmouth Health on  
4 those claims", or on these claims?

5 ATTORNEY SCHROEDER: I'm agnostic on that part, Your  
6 Honor.

7 THE COURT: Plaintiff, any objections to that  
8 proposal?

9 ATTORNEY JONES: Well, I think it should be "on that  
10 claim". Otherwise, it sounds like it's global, like a failure  
11 to meet a burden of proof on one means it affects others.  
12 Otherwise, I don't have a problem with that concept.

13 With regard to the remaining edits, my concern is that  
14 there are affirmative defenses in this case on which Dartmouth  
15 Health bears the burden of proof. So I don't think it's  
16 accurate to say that only Dr. Porter bears the burden of proof  
17 on all issues before the Court.

18 So I would argue that you retain the language at the  
19 bottom of Page 7, "the party having the burden of proof",  
20 because, for example, mitigation of damages is an issue on  
21 which Dartmouth Health has that burden. On Page 8 I understand  
22 getting rid of "he", but maybe it should be, "Dr. Porter or  
23 Dartmouth Health must prove the element" to be accurate with  
24 regard to multiple burdens of proof in this case.

25 THE COURT: Dr. Porter or Dartmouth Health?



1 ATTORNEY JONES: Correct.

2 THE COURT: Yeah, it is true there are affirmative  
3 defenses in the case, right?

4 ATTORNEY SCHROEDER: Well, there's only -- I believe  
5 it's affirmative defense of mitigation of damages, but there  
6 are six claims in this case, and all six are plaintiff's  
7 burden. So is there an affirmative defense at the end? Yes,  
8 but you have a specific jury instruction to that point. But  
9 this isn't a case of claims and counterclaims, right? It is  
10 six claims. All of them are Dr. Porter's. That, I think, is  
11 the general point of why, raising that up front. I think you  
12 deal with it, quite honestly, Your Honor, to the extent that  
13 there is an affirmative defense, it is at the end of the jury  
14 instructions relating to just that one issue.

15 ATTORNEY JONES: I would just be concerned, Your  
16 Honor, that, if the jury is thinking about that and there's a  
17 question in the jury room about who does bear the burden of  
18 proof and they go back to your burden of proof section and  
19 there's no reference to the fact that both parties may bear a  
20 burden depending on the issue, that it could be confusing to  
21 the jury.

22 THE COURT: So on the top of Page 8, Mr. Jones, where  
23 you have suggested, I believe, "Dr. Porter or Dartmouth  
24 Health", right?

25 ATTORNEY JONES: That's correct, but, also, at the

1 bottom of Page 7, I would just retain the language you had that  
2 refers to, "You must decide that issue against the party having  
3 the burden of proof", because it depends on who has the burden  
4 of proof on that issue.

5 THE COURT: Okay, all right. So this particular  
6 issue, let me take a look at the later instructions and figure  
7 out what I'll do there, and you'll have another opportunity to  
8 see that. So, just by the way, if it turns out -- looks like  
9 there may be some edits that we'll have to make,  
10 unsurprisingly, and, if that happens, what I'll do is we're  
11 going to get you another copy this evening of any changes that  
12 were made, and, because it will be later tonight, hopefully  
13 we'll get you a red line kind of track changes version as well  
14 so you can see whatever has been made, and then we can come  
15 back tomorrow morning a little bit on the earlier side. This  
16 way, if you want to lodge any additional objections, you'll  
17 have an opportunity to.

18 ATTORNEY SCHROEDER: Thank you, Your Honor. That's  
19 why we did the red line as well and give copies to the Court so  
20 that, if I'm not as articulate as our red lines are, you'll at  
21 least know what I was speaking about today.

22 THE COURT: Okay, all right. "Corporation Acts  
23 Through Its Employees", plaintiff, any objection to that?

24 ATTORNEY JONES: No objection.

25 THE COURT: And defendants?

1           ATTORNEY SCHROEDER: Your Honor, one change there,  
2           and, actually, it really relates to the next paragraph. The  
3           next paragraph, we would agree to the whole paragraph but move  
4           it up first, because I think it actually flows, like first  
5           stating "All Persons Equal Before the Law" and then  
6           "Corporation Acts Through Its Employees".

7           And then, with respect -- but more specifically on just  
8           this paragraph, "Corporation Acts Through Its Employees", the  
9           third sentence, "Therefore, the act", I think the law is more  
10          appropriate to say that the act of a high-level Dartmouth  
11          Health employee that occurred while he or she was on duty and  
12          acting within the scope of his or her employment duties.

13          I mean, otherwise, you could hold Dartmouth Health liable  
14          for any act of any employee, and I don't think that's -- even  
15          with the more liberal standard of agency law under the Second  
16          Circuit precedent, it needs to be a high-level employee acting  
17          within the scope.

18          THE COURT: Okay. Plaintiffs, do you have any  
19          objection to that?

20          ATTORNEY JONES: Well, I guess that begs the question  
21          of what's a high-level employee, and how is that going to be  
22          defined and how is that going to provide guidance to the jury?

23          THE COURT: Mr. Schroeder, is that the specific  
24          language you're proposing is the words "high-level"?

25          ATTORNEY SCHROEDER: That's what we have here, but,

1     you know what, Your Honor? I would be inclined to put  
2     executive.

3             THE COURT: Executive?

4             ATTORNEY JONES: I think that's a very limited  
5     statement of the law.

6             THE COURT: Yeah. Is executive the same as  
7     supervisory? I don't think so.

8             ATTORNEY JONES: Officials well below the executive  
9     level can bind a corporation.

10            THE COURT: That seems true.

11            ATTORNEY SCHROEDER: Management level then, I guess,  
12     would be -- management level, Your Honor?

13            THE COURT: It seems like supervisory would work  
14     better there, little more --

15            ATTORNEY SCHROEDER: Maybe I'll let Ms. McDonald  
16     argue since she's the one that actually suggested that  
17     language. But very well, Your Honor.

18            THE COURT: Mr. Jones?

19            ATTORNEY JONES: We would agree to that.

20            THE COURT: Okay. And, again, in the section,  
21     "Corporation Acts Through Its Employees", then the last  
22     sentence of that section, "Therefore, the act of any  
23     supervisory level Dartmouth Health employee" is the agreement?

24            ATTORNEY JONES: Yeah.

25            THE COURT: Okay. And, Mr. Jones, what about the

1 proposal that the two sections be kind of --

2 ATTORNEY JONES: That's fine.

3 THE COURT: So then the "All Persons Equal Before the  
4 Law" would precede "Corporation Acts Through Its Employees". I  
5 believe Mr. Schroeder has already indicated no substantive  
6 objections to "All Persons Equal Before the Law".

7 ATTORNEY SCHROEDER: Correct, Your Honor.

8 THE COURT: And, plaintiff, any objections to the  
9 language in "All Persons Equal Before the Law"?

10 ATTORNEY JONES: No objection.

11 THE COURT: Okay, all right. So those are kind of  
12 the general charges. On Page 9 then, "Influenced  
13 Decision-Maker", plaintiff have any objection to that?

14 ATTORNEY JONES: No objection.

15 THE COURT: Defendants?

16 ATTORNEY SCHROEDER: Continuing objection, Your  
17 Honor, just on the inclusion of anything relating to the cat's  
18 paw theory. One of the supplemental jury instructions that we  
19 sent the Court, which was not a case that we cited before but  
20 we did cite in the supplemental jury instructions, was  
21 *Gentleman v. State University of New York Stony Brook*, Second  
22 Circuit, May 9, 2022, Westlaw cite 2022 WL 1447381.

23 In that the court said, quote, "We have never determined  
24 whether the 'cat's paw' theory of liability can apply under the  
25 'but-for' standard of causation applicable to claims under the

1 ADA and Rehab Act", end quote.

2 And so I'd submit, Your Honor, that that should not be  
3 before the Court. Obviously, you've heard our arguments -- I'm  
4 not going to repeat them -- on New Hampshire and Vermont law,  
5 but this, I think, is, this particular case, I think, from it  
6 you can glean that that is not a theory that has been  
7 recognized under ADA and Rehab Act cases as opposed to Title  
8 VII cases, which this case is not, and so I'd submit that the,  
9 that the entire instruction is inappropriate.

10 In addition, I don't think it's appropriate to say, use  
11 the words "without reassignment to another position at  
12 Dartmouth Health" in this particular section, but that's a  
13 separate issue that we would raise. So I would remove that  
14 language in both places, but I think that the overall  
15 objection, Your Honor, is based on Second Circuit precedent  
16 that, where we're talking about ADA or Rehab Act claims, and  
17 what I understood from earlier hearings that it is, the cat's  
18 paw theory, is recognized under Title VII as well as ADA and  
19 USERRA claims. This case, though, the *Gentleman* case, I think,  
20 is helpful guidance or instructive guidance for the Court on  
21 why the cat's paw theory shouldn't be given to the jury.

22 The other issue separate and apart from that, the law, is  
23 just from the facts in the record, Your Honor, that,  
24 respectfully, unlike the Second Circuit, which made lots of  
25 inferences in its decision, there is a stark difference between

1 what was inferred by the Second Circuit and the record evidence  
2 in this case. And I don't believe there is any evidence to  
3 suggest even remotely that somehow Leslie DeMars was playing  
4 the role of the supervisor under, you know, the supervisor with  
5 animus under the cat's paw theory.

6 THE COURT: Okay, all right. Obviously, that all  
7 depends on what the jury makes of the facts that have been  
8 presented, but let me just be clear, Mr. Schroeder, on the  
9 objection. So you are objecting globally, first off, to the  
10 instruction. I think I got that much. To the extent that the  
11 instruction is included, then your objection is more  
12 specifically to the last words of that section, "without  
13 reassignment to another position at Dartmouth Health"?

14 ATTORNEY SCHROEDER: Right. And then further down it  
15 actually says "without reinstatement to another position at  
16 Dartmouth Health". So that's, I think that's inappropriate,  
17 anyway.

18 THE COURT: Oh, sorry. So let me just be clear about  
19 that. So in the second paragraph, fourth line up where the  
20 sentence begins, well, not the sentence begins, but the line  
21 begins "unlawful bias" --

22 ATTORNEY SCHROEDER: Yes.

23 THE COURT: -- "or retaliatory motive to terminate  
24 Dr. Porter", you object to "without reinstatement to another  
25 position at Dartmouth Health"?

1 ATTORNEY SCHROEDER: Correct.

2 THE COURT: And then the next line you also object to  
3 "without reassignment to another position at Dartmouth Health"?

4 ATTORNEY SCHROEDER: There as well as at the -- yes,  
5 Your Honor, but also at the second line of that paragraph where  
6 it also says "without reassignment to another position at  
7 Dartmouth Health", so it's actually three places.

8 THE COURT: And, just so I'm clear, the basis for  
9 that objection is what if this instruction were included?

10 ATTORNEY SCHROEDER: I think where the cat's paw  
11 theory -- the cat's paw theory, to the extent that it's been  
12 employed, is with respect to termination, and I, we'll get into  
13 the issue of where the ADA relates to, and Rehab Act, relate to  
14 disability discrimination in the context of termination and  
15 potential claims for disability discrimination relating to  
16 retaliation or a failure to reassign to another vacant, open  
17 position.

18 I think part of my issue here, Your Honor, is that the law  
19 is really clear on this, the statute's clear, the case law is  
20 clear that it has to be a vacant, existing, open position. It  
21 has to be an available position, and I think throughout the  
22 charge it's stated as reassignment to another position. That's  
23 not the, that's not what the statute says, and it's certainly  
24 not what the case law that's developed under the statute since  
25 1993 has held.



1           So my general objection, really, and, again, it flows  
2           through our red line, is to the issue of, to the extent that  
3           the Court is going to insert language on potential  
4           reassignment, potential reassignment to an open, vacant,  
5           existing position, that would be in concert with the law, as  
6           opposed to just saying reassignment or, in this case,  
7           reinstatement to another position. That's not, that's not  
8           consistent with the ADA, in our opinion.

9           THE COURT: Okay, all right. So I will take another  
10          look at the *Gentleman* case that you cited, but, at this time,  
11          I'm going to leave the "Influenced Decision-Maker" section in,  
12          but I've heard your objections and will take that into  
13          consideration after the hearing.

14          So, with respect to "Overview of Claims" on Page 9,  
15          plaintiff, any objection to that section?

16          ATTORNEY JONES: No objection.

17          THE COURT: Okay. Defendants?

18          ATTORNEY SCHROEDER: Just at the last line, Your  
19          Honor, of that paragraph, I would propose or will propose right  
20          before the next heading to say, "regarding potential damages,  
21          if any".

22          THE COURT: Oh, where it now says "and regarding  
23          damages", you're saying "and regarding potential damages"?

24          ATTORNEY SCHROEDER: If any.

25          THE COURT: Plaintiff, what's your view on that?

1 ATTORNEY JONES: I think we prefer the existing  
2 language. I think that it's standard language. I think  
3 injecting the phraseology of potential coming from a judge kind  
4 of suggests to the jury that maybe there aren't any. So I  
5 think the language currently is neutral and that makes it less  
6 than neutral.

7 THE COURT: Though, in the damages section of the  
8 instruction, there is language "if any".

9 ATTORNEY JONES: Exactly. That's fine, talking about  
10 the damages there, that's fine.

11 THE COURT: Okay, all right. I'll take that under  
12 consideration too. I see the arguments on both sides there.  
13 Okay. Now, getting into the substance, "New Hampshire  
14 Whistleblowers' Protection Act", plaintiff, any objections?

15 ATTORNEY JONES: No objection, Judge.

16 THE COURT: Okay. Defendants?

17 ATTORNEY SCHROEDER: Your Honor, a couple of points  
18 here. I'm not necessarily going to go in the same order.  
19 Well, let me start at the top. In the first paragraph, and  
20 I'll just go according to the chronology of paragraphs here.  
21 The second-to-last line of the first full paragraph it states,  
22 "asserts that it had a legitimate business reason". I think  
23 we've put sufficient evidence on in the case to say it had  
24 legitimate business reasons. It was not one reason.

25 In terms of the next paragraph, I think the third

1 sentence, "its purpose", I don't think that's necessary for  
2 purposes of the instruction, but, obviously, it's the  
3 discretion of the Court in terms of whether that's necessary or  
4 not. I don't believe it's necessary.

5 THE COURT: Okay.

6 ATTORNEY SCHROEDER: But the bigger issue, Your  
7 Honor, really comes down to the elements, the first, second,  
8 third elements and specifically, not the first, but on the next  
9 page, the Whistleblower Act claim as alleged in the first  
10 amended complaint does not include in it a failure to reassign  
11 her to another job at Dartmouth Health, and so it's our  
12 position that that would be inappropriate to include that as  
13 part of the elements. It's a Whistleblower Act claim. When  
14 you look at the first amended complaint, it does not include  
15 any allegations regarding that statement there in the second  
16 and third elements.

17 In addition, with respect to "Termination of Employment",  
18 which is Paragraph 2, I don't -- I, I think there is a, perhaps  
19 a disagreement in terms of whether or not we agree on the  
20 second element. I think saying that Dartmouth Health  
21 terminated Dr. Porter's employment and did not reassign her to  
22 another job at Dartmouth Health leaves out the fact that there  
23 was an REI division closure and she was terminated along with  
24 two other physicians.

25 And so whether it just says "Dartmouth Health terminated

1 her employment", period, that would perhaps be a secondary or  
2 alternative statement, but I think getting into whether or not  
3 we even had a duty to reassign and the fact that it doesn't say  
4 anything about the REI division closure, as well as the fact  
5 that, the undisputed fact that two other physicians were  
6 terminated at the same time, I think, if the Court was going to  
7 say that we agreed to certain language, I think it would be, it  
8 needs to be more comprehensive than as currently constituted.

9 THE COURT: But doesn't closure go to the kind of  
10 legitimate business reason part of the instruction?

11 ATTORNEY SCHROEDER: It does, but I think putting in  
12 there "and did not reassign her to another job at Dartmouth  
13 Health", once again, that's not part of the Whistleblower Act  
14 claim as it's been alleged in this case.

15 THE COURT: Okay. Anything else for --

16 ATTORNEY SCHROEDER: Yes. I think, on the next page,  
17 which is Page 12, still in the top paragraph, I'm not sure I  
18 understand the last sentence of the first paragraph on Page 12.  
19 It states, "Other ways you may find causation could be through,  
20 A, Dartmouth Health's disparate treatment of fellow employees  
21 who engaged in similar conduct as Dr. Porter". I'm not sure.  
22 I would think that that would say, "Other ways you may find  
23 causation does not exist would be disparate treatment of fellow  
24 employees". I think it might need some wordsmithing.

25 The other issue is relating to subparagraph B,

1 "deficiencies in Dartmouth Health's articulated". I would  
2 recommend language that says "actual", and I think here, Your  
3 Honor --

4 THE COURT: Let me just stop you, Mr. Schroeder.  
5 Where are you in the --

6 ATTORNEY SCHROEDER: Sure. It's still in that same  
7 paragraph, Your Honor.

8 THE COURT: So Page 12 at the top? Okay.

9 ATTORNEY SCHROEDER: Yeah, right at the top in the  
10 second-to-last. The last sentence says, "Other ways you may  
11 find causation could be through Dartmouth Health's disparate  
12 treatment of fellow employees who engaged in similar conduct as  
13 Dr. Porter".

14 THE COURT: Right.

15 ATTORNEY SCHROEDER: It's actually the inverse. It's  
16 that, you know, our -- causation, if other people who had  
17 complained were not fired or terminated or subject to adverse  
18 employment action, well, that would obviously go against  
19 causation, actually. Subparagraph B, our suggested language is  
20 actual instead of articulated reasons, because articulated  
21 reasons doesn't make the distinction, and, obviously, we've put  
22 a lot of evidence in front of the jury.

23 What you say to the media or what you say to a nurse who  
24 is not in that division in an email or what you say to the  
25 media in terms of whether or not you share all the information,

1 that doesn't make it pretext because you do that. They can  
2 argue that, but to say "articulated reasons" is a loaded term,  
3 I believe, and it should be "actual reasons", because that's,  
4 that's our position in this case, and it's also a way to rebut  
5 a whistleblower claim.

6 THE COURT: Okay. But then aren't I kind of  
7 crediting then kind of your theory of the case in the  
8 instructions if I leave it as actual, kind of saying, This is  
9 what was proffered, and it's the actual reasons?

10 ATTORNEY SCHROEDER: No. I think they're still going  
11 to argue that, Well, they said this in writing, so isn't that  
12 their actual reasons? And we obviously have explained why what  
13 is said to the media and what may or may not be attributed as a  
14 quote to the media does not suffice. If it's articulated, I  
15 think that's a loaded term as it is.

16 Actual, they can still argue, and they have argued, that,  
17 Well, look at what they say in this email to this one nurse,  
18 and look what they say to the media, and I think they, based on  
19 that, saying the actual reasons, and they have to determine  
20 that, right? They either believe Dartmouth Health, or they  
21 don't, and they may determine that the actual reasons are  
22 contrary to what we say, but that's open for dispute by both  
23 sides, and I think it's neutral in that regard.

24 THE COURT: Okay. Anything else for that section?

25 ATTORNEY SCHROEDER: I think further down, Your

1 Honor, on that page, on Page 12, the last full paragraph starts  
2 "Dartmouth Health claims it did not terminate Dr. Porter  
3 because of her whistleblowing activity".

4 Now, she's claimed a lot of different things, but saying,  
5 "i.e. reporting that two Dartmouth Health physicians were  
6 engaging in conduct that she thought was unlawful, unethical,  
7 or dangerous to patients", I think the "i.e." clause is  
8 inappropriate because she's -- and I would just leave it at  
9 whistleblowing activity because she's complained about a lot of  
10 things, and whether or not that rises to the level of  
11 whistleblowing activity is for the jury to decide, but saying  
12 "i.e. reporting that two Dartmouth Health physicians were  
13 engaging in conduct that she thought was unlawful, unethical,  
14 or dangerous", I think we're getting into parsing the facts in  
15 the record through testimony and emails as opposed to leaving  
16 it to the jury to decide.

17 THE COURT: I can't recall exactly what the  
18 allegations were in the first amended complaint under this  
19 particular claim, but is it along those lines where that's  
20 specifically articulated?

21 ATTORNEY SCHROEDER: I think, Your Honor, it goes  
22 above and beyond that. In the first amended complaint, I think  
23 it -- well, I have it in front of me. It's 35 pages. Page 31  
24 relates to this issue, relates to the compensation,  
25 participating in activities she believed in good faith violated

1 the law.

2 THE COURT: A, B, C, and D, that's Dr. Hsu and Dr.  
3 Seifer, isn't it?

4 ATTORNEY SCHROEDER: That is Dr. Hsu and Dr. Seifer,  
5 but she's not enunciate -- I just think we're getting into,  
6 Well, are we guiding the jury on what plaintiff's claims are at  
7 this point as opposed to anyone else -- specifically pointing  
8 out "i.e.", I would just say it should be whistleblowing  
9 activity. They've got to determine that. You've got  
10 instructions on that.

11 And further in that paragraph, to this, to the point of  
12 "but rather made a business decision to close its REI division  
13 resulting in the termination of all three physicians in the REI  
14 division". It then goes on to say, "and that there was no  
15 other suitable position for Dr. Porter at Dartmouth Health".  
16 That's not the standard under a whistleblower claim, and I  
17 would just delete the phrase "and that there was no other  
18 suitable position for Dr. Porter at Dartmouth Health". That's  
19 not part of a whistleblower claim.

20 The same holds true, Your Honor, and this is all reflected  
21 in what we'll give you so that the Court understands our  
22 position, but the last full sentence of that section which goes  
23 on to Page 13 then says, quote, "and not reassigning her to  
24 another job at Dartmouth Health", end quote. That's not the  
25 standard under -- that's not a whistleblower claim, but, also,



1 it's not the standard under the ADA, and my fear, our fear is  
2 that we need to make sure that the standard -- well, first of  
3 all, what is the requirement under each claim? And that's  
4 certainly not part of their whistleblower claim, but also  
5 that's kind of a watered-down version of what the law is under  
6 the ADA and Rehab Act for purposes of reasonable accommodation.

7 THE COURT: All right. So that's kind of a global  
8 concern you've raised for that particular charge. Obviously,  
9 I'm going to give that consideration.

10 ATTORNEY SCHROEDER: I understand that. Thank you.

11 THE COURT: Yeah, yeah. No. I understand your  
12 objections. I just wanted to be clear on them. So,  
13 plaintiffs, let's go back to this particular --

14 ATTORNEY JONES: Can I just start with that global  
15 issue?

16 THE COURT: Yes.

17 ATTORNEY JONES: Because, from our perspective, the  
18 nonreassignment issue is very much part of the whistleblower  
19 claim. In fact, from our perspective, it's part of all the  
20 claims, that this is a case where Dartmouth Health terminated  
21 Dr. Porter and failed to retain her in some capacity, either in  
22 retaliation for whistleblower activities or as a form of  
23 discrimination or retaliation with regard to the disability  
24 issue. So we believe that is part of all of the claims. It's  
25 not limited to the ADA.

1           And I would also note that the Second Circuit was very  
2           clear in its articulation of all the various claims, and they  
3           also used that language. So, from our view, you have correctly  
4           identified the claims. So that's the global issue.

5           THE COURT: Okay.

6           ATTORNEY JONES: Did you want to start from the  
7           beginning?

8           THE COURT: Yes. So, so the first objection on Page  
9           10 in the first paragraph, the last sentence, I believe the  
10          objection was, not "a legitimate business reason", but  
11          "legitimate business reasons".

12          ATTORNEY JONES: Well, I mean, I guess it's disputed  
13          as to whether it had any legitimate business reason or how many  
14          there may have been, but that's not a hill I need to die on.  
15          So, if the Court were inclined to take that correction, I  
16          wouldn't object.

17          THE COURT: Okay, all right. And then, and then the  
18          next paragraph, Dartmouth is claiming that the sentence  
19          beginning "its purpose is to encourage employees", the purpose  
20          is not necessary in the charge.

21          ATTORNEY JONES: I disagree. I think the purpose is  
22          important. It explains why we have whistleblower protection  
23          laws. So I think, I think it's valuable to have it in there,  
24          and I don't see any prejudice from it.

25          THE COURT: I'm going to leave the purpose sentence

1 as it is for that. And, with respect to the one that we just  
2 talked about in the first paragraph, you know, reason versus  
3 reasons, I'll, you know, take that under consideration and make  
4 a decision about that. So I think, I think those were all of  
5 them, if I'm not mistaken, for that section.

6 ATTORNEY JONES: Well, there was the issue of, on  
7 Page 12 at the bottom of the first paragraph, Mr. Schroeder  
8 wants to change the word "articulated" to "actual". I would  
9 object to that. As Your Honor points it out, that, that does  
10 seem to credit their case. But, more importantly,  
11 Mr. Schroeder calls it a loaded term. I call it a legal term.  
12 Every case I think I've ever read that refers to, you know, an  
13 employer's burden in these cases, that the employer must  
14 articulate a legitimate business reason. So it's, it's the  
15 articulation that is the legal standard. So I think that  
16 should stay in. That's the accurate statement of the law.

17 THE COURT: And that's why the term, frankly, was  
18 used, so I'm going to leave that term in there. And then,  
19 going down two paragraphs, the "i.e." clause --

20 ATTORNEY JONES: Well, I think that that is her  
21 claim, and, as was discussed, that's in the complaint. Again,  
22 that's also exactly how the Second Circuit describes her claim.  
23 So I, I don't see any -- I think it's accurate. I'd note that  
24 the remainder of the paragraph is a full description of their  
25 defenses. So if, you know, if they get to talk about -- well,

1 if the Court is going to talk about the defenses of closing the  
2 REI, terminating all the other physicians, I don't see any  
3 problem with the balance of accurately describing what her  
4 claim is.

5 THE COURT: Yeah, that was in the Porter decision, if  
6 I'm not mistaken.

7 ATTORNEY SCHROEDER: Judge.

8 THE COURT: No, the description. I'm not talking  
9 about the facts how they came in. I understand your point on  
10 that, I do.

11 ATTORNEY SCHROEDER: Right, right. If I may just on  
12 this one point, because I knew it was going to come up and --  
13 well, you know, the Second Circuit said this, and the Second  
14 Circuit said that. We put a bench memo on that issue, Your  
15 Honor, which didn't even receive a response, so -- because I  
16 think the law is clear, right? They were talking about the  
17 summary judgment standard, all inferences in favor of the  
18 nonmoving party. That is not what happened here. That is --

19 THE COURT: No, no. Mr. Schroeder, I am crystal  
20 clear on your point in that regard, but, to the extent that the  
21 Second Circuit has described the whistleblower activity as the  
22 reporting on those two physicians, that has nothing to do with  
23 the summary judgment standard versus the standard at trial.

24 ATTORNEY SCHROEDER: It doesn't, Your Honor, other  
25 than the fact that there was evidence in the trial of

1 complaints about a whole range of things, not just -- I don't  
2 believe it was just complaints about those two physicians. She  
3 complained about Dr. DeMars. She complained about a whole  
4 range of issues, including Dr. Reindollar, including the former  
5 physician Sophia.

6 So I think limiting it to the two physicians is, would be  
7 inappropriate because then you're basically -- that's different  
8 from, and this is why this goes back to what was in the Second  
9 Circuit decision and what was put in front of the jury was the  
10 complaints to Reindollar, the conflicts with Reindollar, the  
11 complaints about other physicians.

12 We had Judy Stern, Kelly Mousley, Katy Mansfield, all of  
13 those people, so I think it's way beyond that, Your Honor, and  
14 limiting it to, well, the two physicians, yes, she did make  
15 those complaints, no question. I don't even think we disputed  
16 that. I think we even acknowledged it in the opening  
17 statement, but the evidence of whistleblowing activity is much  
18 broader than that, and hyperfocusing on just the two  
19 physicians, I think, would be inappropriate.

20 ATTORNEY JONES: Your Honor, if I may.

21 THE COURT: Okay.

22 ATTORNEY JONES: The way you have it actually  
23 describes the complaints that we say were the whistleblowing  
24 activity. All the other complaints they're talking about is  
25 their attempt to say she complained about everything. The

1 petty complaints they're talking about, that's not our  
2 whistleblowing. She wasn't blowing the whistle over that  
3 stuff.

4 THE COURT: Yeah, and, in particular when you look on  
5 Page 11, Number 1, "Reported in good faith", I mean, that kind  
6 of, you know, provides a little bit more in the way of context  
7 as to what type of reporting fits within a whistleblower claim.  
8 It's not simply kind of complaining about other people  
9 generically, it's about the types of things that she reported  
10 in her letters about Dr. Hsu and Dr. Seifer, isn't it?

11 ATTORNEY SCHROEDER: It could be. I think it's way  
12 beyond just that, and there are other complaints.

13 THE COURT: So whistleblowing -- I just want to be  
14 clear. So, in your view, there is other evidence in the record  
15 of whistleblowing activity, legitimate kind of -- legitimate,  
16 that suggests the answer, I guess, but, in terms of the charge,  
17 this particular charge, you're saying there's other evidence in  
18 the record that meets the legal definition of reported in good  
19 faith other than the commentary on Dr. Hsu and Dr. Seifer?  
20 There's other evidence of whistleblowing activity?

21 ATTORNEY SCHROEDER: I think there's evidence that  
22 they could argue is whistle -- listen, I don't believe any of  
23 this meets the definition of a whistleblower retaliation claim,  
24 Your Honor. Let me be clear about that. My point is that  
25 whistleblowing activity, stating that just in and of itself is

1 sufficient, and then to say "i.e." and making a specific  
2 reference to just those two physicians leaves out all the other  
3 times in evidence.

4 Because, when we get into a retaliation case, one of those  
5 issues further on down the line is temporal proximity, right?  
6 So there is evidence of complaints, and we could assume for  
7 sake of argument for this purpose that they were legitimate  
8 back to 2012 with Dr. Reindollar and conflicts and disputes  
9 about skills and techniques. So my only point here is that  
10 you're hyperfocusing the jury on one specific item that was in  
11 the record, and I'm not disputing that it was in the record,  
12 but calling attention to it, I think, is inappropriate in the  
13 jury instruction.

14 THE COURT: Okay, all right. And, you know, as I  
15 said, you know, the complaint under this section, though, does  
16 essentially zero in on the Hsu/Seifer information, and that's  
17 in large part why this instruction reads the way it does,  
18 right? Because that's what the claim is focusing on in the  
19 complaint.

20 ATTORNEY SCHROEDER: I understand your point, Your  
21 Honor.

22 THE COURT: Okay, all right. So, I mean, we'll, at  
23 least I'll take another look in terms of the way it's phrased  
24 in terms of the "i.e.", but, at this point, I'm going to leave  
25 that in there but take under consideration, as I say, your

1 arguments in that regard.

2 Mr. Jones, I'm not sure if you responded to everything, or  
3 maybe you did. No other suitable position, I have in my notes  
4 here on Page 12, the last full paragraph.

5 ATTORNEY JONES: Yeah, that's part of my global. I  
6 addressed that.

7 THE COURT: Got it.

8 ATTORNEY JONES: Like I said, it's part of our case.

9 THE COURT: Yeah, yeah.

10 ATTORNEY JONES: I don't see anything else that we  
11 haven't covered here.

12 ATTORNEY SCHROEDER: And, just on that last point,  
13 Your Honor --

14 THE COURT: Yes, yes.

15 ATTORNEY SCHROEDER: Thank you for your indulgence.  
16 We're either going to live by the first amended complaint, or  
17 we're not, and I understand the Court's highlighting of the  
18 various things that can be related to Hsu and Seifer, but, if  
19 the Court is so indulged in that point, well, there is nothing  
20 about reassignment as part of a whistleblower claim in this  
21 case. There's just nothing. And that's not part of what a  
22 typical whistleblower claim. It's discrimination and  
23 termination or retaliation with respect to termination.

24 But adding in this commentary about there was no other  
25 suitable position, that's not what the law says. It's, Did you



1     retaliate by terminating somebody, period? And so I'd submit  
2     that that's going way beyond the pale. It's also not in their  
3     claim.

4             THE COURT: Okay. So you're saying as a legal  
5     matter, though, reassignment is not part of this particular  
6     claim? As a matter of law, you're saying that can't be part of  
7     it?

8             ATTORNEY SCHROEDER: Correct, reassignment, correct,  
9     Your Honor. One, it's not pled that way. Two, it's never been  
10    alleged that way in any of, in any of the discovery in this  
11    case. Three, the reassignment issue goes to the ADA and Rehab  
12    Act claims and disability discrimination claims. It does not  
13    go to, well, reassignment is something that should be  
14    considered in the context of a whistleblower claim. I've never  
15    -- so, yes, I would submit legally that that would not be an  
16    appropriate remedy or a suitable part of the elements of the  
17    claim.

18            THE COURT: Excuse me. So I was just handed a copy  
19    of the actual New Hampshire statute. So it reads, "No employer  
20    shall harass, abuse, intimidate, discharge, threaten, or  
21    otherwise discriminate against any employee regarding  
22    compensation, terms, conditions, location, or privileges of  
23    employment".

24            So, in your view, that particular language is not broad  
25    enough to encompass that aspect of the claim?

1 ATTORNEY SCHROEDER: Reassignment to another suitable  
2 position as it's stated three or four times in this instruction  
3 is not an appropriate basis for relief under the whistleblower  
4 statute.

5 ATTORNEY JONES: And we would submit that it is a  
6 form of otherwise discriminating against a covered employee.  
7 Also, in this case, I've heard Mr. Schroeder argue this many  
8 times, but this has been a part of the case for many years. It  
9 was part of the appellate proceedings, and the Second Circuit  
10 certainly has characterized all the claims as including that  
11 part of it. This has been part of the case for a very long  
12 time. I know Mr. Schroeder wants to box this issue into a  
13 sliver of ADA land where a reasonable accommodation can be  
14 reassignment to a vacant position. That's not this case. So I  
15 think you understand our position.

16 THE COURT: Right. We've been over that before,  
17 yeah, that particular argument. All right. So "Americans With  
18 Disabilities Act", I'm on Page 13. Plaintiff, maybe we should  
19 take it piece by piece.

20 ATTORNEY JONES: I'll make it easy for you. No  
21 objection.

22 THE COURT: To the whole charge?

23 ATTORNEY JONES: The whole thing's acceptable to us.

24 THE COURT: Okay. Defendants?

25 ATTORNEY SCHROEDER: This is not my first rodeo,

1 Judge. I knew that this was going to be the way that we would  
2 be doing jury instructions. Most of the time plaintiff, in  
3 every other case I've had, usually agrees to the jury  
4 instructions, and I seem to be standing up making suggested  
5 recommendations on revisions to language.

6 If we go by the compliant, the ADA claim is disability  
7 discrimination and retaliation. There's not three types;  
8 there's two types, first of all, as just a threshold issue.  
9 Saying that Dr. Porter may prove that Dartmouth Health  
10 retaliated against her for making a reasonable accommodation  
11 request, if we're going to go back to the Second Circuit  
12 decision, they were very clear. The issue of reasonable  
13 accommodation only comes up in the context of termination. All  
14 of the other claims relating to reasonable accommodation were  
15 dismissed or affirmed dismissal at the Second Circuit, and I  
16 think the Court was clear on that.

17 So saying, well, making it retaliating against her for  
18 making a reasonable accommodation request, I think that's the  
19 third type. I think it's only disability discrimination in the  
20 context of termination and retaliation.

21 THE COURT: But isn't kind of failure to accommodate  
22 and the allegation of retaliating against someone for  
23 accommodations two separate kind of conceptually distinct  
24 things?

25 ATTORNEY SCHROEDER: I think they are, Your Honor,

1 but I think there's two types of allegations here, not three.  
2 And so I've never interpreted this case to be -- and, if I'm  
3 wrong, I'm wrong, and you'll certainly correct me, but I don't  
4 believe that there were three types of disability  
5 discrimination claims in this, that were brought in this case.  
6 It was disability discrimination and retaliation, and I think  
7 breaking it down in that regard would be inappropriate. I have  
8 a few other comments.

9 THE COURT: Okay, yeah. Please go ahead.

10 ATTORNEY SCHROEDER: Okay. Bear with me a second  
11 here. This is just a general statement on the "Otherwise  
12 qualified to perform essential functions", 1.3, subsection 14.  
13 So under the ADA the definition of -- first, you have to show  
14 that somebody's disabled. Then you have to -- then the  
15 plaintiff has to show that they're a qualified individual with  
16 a disability, meaning they can perform the essential functions  
17 of the job with or without reasonable accommodation.

18 We don't agree that they are otherwise, that Dr. Porter  
19 was otherwise qualified to perform the essential functions of  
20 her job because there was no job. And what I don't think  
21 anybody's disputing that, at the time she was terminated, that  
22 she could do her job, but then it gets to the issue of  
23 reasonable accommodation, and we believe there was -- it's our  
24 position, as shown by the evidence, that there was no  
25 reasonable accommodation. So, therefore -- for her, there was

1 no open, vacant position for her to go to. Under that scenario  
2 she is not considered an otherwise qualified individual with a  
3 disability under the ADA.

4 THE COURT: Okay. So this comes back again, though,  
5 to the position, your position about there needing to be an  
6 open, vacant position. This is your global issue?

7 ATTORNEY SCHROEDER: Correct.

8 THE COURT: And, therefore, your 1.3 objection  
9 derives from that?

10 ATTORNEY SCHROEDER: Correct. But also then, not --  
11 I don't think anybody's disputing that, at the time she, her  
12 position was terminated, that she could perform the essential  
13 functions of her job, but she was not a qualified individual  
14 with a disability, meaning able to perform the essential  
15 functions of her job with or without reasonable accommodation.  
16 There was no position for her at that point. That's our  
17 position, and so, therefore, there was no reasonable  
18 accommodation for her.

19 THE COURT: Right, okay. So is there a proposal  
20 about what that should look like?

21 ATTORNEY SCHROEDER: Yes, yes, Your Honor.

22 THE COURT: Okay.

23 ATTORNEY SCHROEDER: That paragraph, we would submit,  
24 should read, "You must determine whether Dr. Porter was  
25 qualified to perform the essential functions of the job she

1 held". So it's getting into that's just on the essential  
2 functions part. So, "You must determine whether Dr. Porter was  
3 qualified to perform the essential functions of the job she  
4 held", that's not the whole story, but that's how we would read  
5 it there in that particular place.

6 THE COURT: Okay. So obviously not agreed?

7 ATTORNEY SCHROEDER: Yes, Your Honor.

8 THE COURT: Okay.

9 ATTORNEY SCHROEDER: In the next paragraph, 1.4, I  
10 think the second paragraph there, the first two lines, I think,  
11 blur the distinction. I mean, this is a but-for. We've gone,  
12 we've had some discussion about the ADA but-for causation  
13 standard. I think that actually blurries it or blurs the lines  
14 there when it says, quote, "Keep in mind that an employee does  
15 not need to prove that discrimination was the only or even the  
16 predominant factor that motivated an employer. You may decide  
17 that other factors were involved in the decision to terminate  
18 Dr. Porter's employment". I think the earlier instruction, I  
19 think, is very clear that you've got to, it's got to be  
20 but-for, but for her disability, this would not happen, as  
21 opposed to you could look at other motivations, et cetera.

22 So we would submit that we would strike those two lines  
23 after "as you assess causation" and just then proceed to, "For  
24 Dr. Porter to meet her burden, you must conclude". Going on to  
25 the next page at the end of that sentence, we would, we would

1 submit that it should say, "She would not have been terminated  
2 but for her disability", just to be consistent with Second  
3 Circuit precedent.

4 THE COURT: Okay. So the bottom of Page 14 it would  
5 read, "For Dr. Porter to meet her burden, you must conclude  
6 that she has proved by a preponderance of the evidence", and  
7 you're proposing taking out the next clause?

8 ATTORNEY SCHROEDER: No, no. There are -- everything  
9 is fine until the last part of it. I would just say she would  
10 not have been terminated but for her disability, just to be  
11 consistent with *Natofsky*.

12 THE COURT: Okay. Again, something I'll take a look  
13 at, but I'm inclined to leave that in. We also researched the  
14 law on this pretty exhaustively. We're not employment lawyers  
15 like you are, but I'm going to leave it for now, and, like I  
16 said, we'll take a look at that. Next paragraph?

17 ATTORNEY SCHROEDER: In the middle of the paragraph  
18 on Page 15, there is a phrase "however misguided they may  
19 appear to you". We would strike that part of the sentence.

20 THE COURT: That didn't come from your proposed  
21 charges?

22 ATTORNEY SCHROEDER: I don't think so.

23 THE COURT: I think it did.

24 ATTORNEY JONES: I think it's in there.

25 ATTORNEY SCHROEDER: Well, if it is, I would, then I

1 guess we'll keep it in, Your Honor. I didn't have a chance to  
2 go -- I mean, this took a little while to get through 30 pages  
3 this morning.

4 THE COURT: No, I understand. Because, when I first  
5 read it, too, I was thinking, trying to be down the middle, and  
6 I'm almost positive I checked defendants' charge and that was  
7 in there.

8 ATTORNEY SCHROEDER: Your Honor, if it's in there,  
9 then let's keep it. That's one less thing that we have to  
10 worry about or the Court needs to consider.

11 THE COURT: I'll just turn to the law clerks here.  
12 Am I mistaken about that? No, it was in your proposed charge.

13 ATTORNEY SCHROEDER: I take everybody's word for  
14 that.

15 THE COURT: Okay.

16 ATTORNEY SCHROEDER: The last paragraph before Number  
17 2 on Page 15, once again, this goes to whether you believe  
18 Dartmouth Health's reasons for the decision. If you do not  
19 believe Dartmouth Health's reasons, you may consider whether  
20 the reasons are so unbelievable that they are a cover-up to  
21 hide the true discriminatory reason for the decision. So I  
22 just want to make sure that globally that it's reasons, because  
23 there were reasons. It wasn't just one reason.

24 THE COURT: Okay. This is the last paragraph before  
25 2, right?



1 ATTORNEY SCHROEDER: Correct, Your Honor.

2 THE COURT: And doesn't -- so the "for example"  
3 sentence, is that the one that you're -- towards the bottom of  
4 that paragraph?

5 ATTORNEY SCHROEDER: Yes, right before that there is,  
6 it starts, For example, you may consider whether you believe  
7 Dartmouth Health's reasons for the decision. If you do not  
8 believe Dartmouth health's reasons, you may consider whether  
9 the reasons are so unbelievable.

10 THE COURT: So they're plural now, and that's your  
11 suggestion, right?

12 ATTORNEY SCHROEDER: Yes.

13 THE COURT: Okay. So no change?

14 ATTORNEY SCHROEDER: I was just wordsmithing a little  
15 bit there, Your Honor, but --

16 THE COURT: Okay, all right. Now I'm in 2 on Page  
17 15, "Failure to grant reasonable accommodation request".

18 ATTORNEY SCHROEDER: No issues there. No issues in  
19 2.1. No issues in 2.2. In 2.3 where it states "first" in the  
20 second line, we would remove everything after "first" and put  
21 that she was, put the following: "That she was able to perform  
22 the essential functions of her job with or without reasonable  
23 accommodation".

24 THE COURT: Okay.

25 ATTORNEY SCHROEDER: On the top of Page 17, Your

1 Honor -- so nothing in 2.3.1 other than the, 2.3.1, other than  
2 at the end of that paragraph which goes on to the top of Page  
3 17. We would ask that "with or without a reasonable  
4 accommodation" as opposed to just "an accommodation".

5 THE COURT: Okay. Top of Page 17, second line, "with  
6 or without a reasonable accommodation" is the request?

7 ATTORNEY SCHROEDER: Correct.

8 THE COURT: Okay.

9 ATTORNEY SCHROEDER: In 2.3.2 "Essential Functions",  
10 at the end of the first paragraph, we would just put what this  
11 case is about, which is really the only reasonable  
12 accommodation is, may include job reassignment or reassignment,  
13 just include reassignment. Because that's really the only  
14 issue before the jury.

15 THE COURT: So, even if that is generally part of the  
16 law of what a reasonable accommodation could be, do you think  
17 that should come out?

18 ATTORNEY SCHROEDER: I do, Your Honor, because  
19 there's no -- I think they can get confused by part-time or  
20 modified work schedule or job restriction. Those are certainly  
21 under the statute, Section 12111(B), (9)(B), they are listed as  
22 potential reasonable accommodations, no question about that. I  
23 just think this case is all about reassignment, and I don't  
24 want, I don't want the jury to think that there are other  
25 things at play here in this particular case, because there's no

1 evidence to suggest that there was a part-time or modified work  
2 schedule or a job restructuring. There's no evidence of that  
3 in the record.

4 THE COURT: Okay.

5 ATTORNEY SCHROEDER: In terms of the end of Paragraph  
6 17 which goes on to 18, I don't think that the parties are  
7 disputing the job functions and whether they're essential. So  
8 I don't -- I think it's superfluous to put in, "In determining  
9 whether a job, particular job function is essential", and then  
10 it goes all the way to the middle of Paragraph 18. I don't  
11 think it's necessary to go through all that with them because  
12 we're, really, what the case is about is whether or not there  
13 was reassignment to a vacant, open position.

14 And so, obviously, these instructions are long. I just  
15 did not think in this particular case that we were talking  
16 about whether or not something was an essential function or  
17 whether or not it was a marginal job function, which is in play  
18 in a lot of ADA cases, but that's not really at play in this  
19 case.

20 THE COURT: So you're saying A through H, all of that  
21 should come out?

22 ATTORNEY SCHROEDER: Yes, Your Honor.

23 THE COURT: And the objection, though, is just  
24 superfluous, not legally inappropriate?

25 ATTORNEY SCHROEDER: Correct. I think it's not

1 really an issue that this jury needs to worry about, and,  
2 obviously these are 30 pages long, and I just --

3 THE COURT: I thought they'd be longer.

4 ATTORNEY SCHROEDER: Yeah. Well, I'm doing my level  
5 best to hopefully keep it short with you. So that, that's just  
6 a suggestion just based upon what's before the Court.

7 In 2.4 our suggestion is the following, that that first  
8 paragraph and second paragraph should be limited to the  
9 following: So delete what's there and put, "You must determine  
10 whether Dartmouth Health failed to make a reasonable  
11 accommodation for Dr. Porter by reassigning her to a vacant,  
12 existing position", period.

13 Once again, I think putting in language about the term  
14 "reasonable accommodation", I think it's redundant with the  
15 following paragraph where you actually do have language about  
16 what a reasonable accommodation may include and that we're not  
17 objecting to that or the following paragraph. But I think the  
18 whole case comes down to whether or not Dartmouth Health had a  
19 duty to reassign her to a vacant, open position, and so --

20 THE COURT: So, to the extent that that's your  
21 objection, I think we've established now that you have your  
22 view on that. It may be a little bit more fluid and a little  
23 bit more nuanced than that. That's my understanding of the law  
24 as well. So, to the extent that that is your objection, I  
25 mean, obviously, make those objections for the record as you

1 will, I know, but, you know, again, I'm not, I'm not certain  
2 that that's something that the Court agrees with on that point.  
3 So but I hear your position.

4 ATTORNEY SCHROEDER: Just on that, Your Honor, and  
5 I'm not trying to belabor this point, but the *Graves v. Finch*  
6 case, the *Payne v. Cornell University* case, the *Finch v. New*  
7 *York City Department of Persons* case, the *Noll v. International*  
8 *Business Machines Corp.* case, all of those are Second Circuit  
9 decisions on this specific issue, and I know I mentioned them  
10 in my motion for directed verdict in fairly quick fashion, but  
11 they go right to the heart of that issue, and I realize that  
12 I'm making somewhat of a continuing objection in that regard,  
13 but and I appreciate the Court's indulgence.

14 THE COURT: Okay. So are we still on 2.4 with your  
15 --

16 ATTORNEY SCHROEDER: Yes, Your Honor, the middle of  
17 Page 19 now. The paragraph, there's two paragraphs identifying  
18 the term "reasonable accommodation". We have no objections  
19 there. What we object to, though, is the third paragraph which  
20 starts "an employer has a duty". We would strike that entire  
21 paragraph with the exception of the last part which is, "Both  
22 employer and employee must cooperate in the interactive process  
23 in good faith".

24 The law on the ADA, specifically physical disabilities as  
25 opposed to mental disabilities, is that the employee has a duty

1 to request an accommodation. The only place where the duty  
2 kind of falls back to the employer is on the issue of mental  
3 health disabilities because, as courts have logically said,  
4 well, if somebody's got a mental health disability, they may  
5 not be in a position to actually ask for an accommodation. So  
6 I don't believe that that paragraph as written is consistent  
7 with the law on that point.

8 THE COURT: Okay. So your proposal is to strike the  
9 entire paragraph except for the --

10 ATTORNEY SCHROEDER: The last sentence.

11 THE COURT: -- last sentence?

12 ATTORNEY SCHROEDER: Which is true. The last  
13 paragraph on that page we would strike the last sentence which  
14 is, states, quote, "An employer, by failing to engage in a  
15 sufficient interactive process, risks not discovering a means  
16 by which an employee's disability could have been accommodated  
17 and thereby increases the chances of failing to reasonably  
18 accommodate the employee". I think that's making a judgment  
19 call, and I'm not sure why we would be calling out one side  
20 versus the other there. I think it's inappropriate to have  
21 that sentence.

22 THE COURT: Okay. So I'm hearing your objections,  
23 but I, I know they're based on kind of your view of the law, so  
24 I'm not kind of ruling on these particular ones with respect to  
25 the ADA until revisiting some of these legal questions. So

1 that's the bottom of Page 19?

2 ATTORNEY SCHROEDER: Yes, Your Honor.

3 THE COURT: Okay. So I know plaintiffs indicated no  
4 objection at all to this section. Any comments on the  
5 objections that have been raised?

6 ATTORNEY JONES: Well, the last two proposed  
7 revisions would completely eliminate all reference to the  
8 interactive process from the instructions, which I think would  
9 be highly inappropriate. We do think there was a failure to  
10 engage in the interactive process here, and that's part of our  
11 alleged violation. With regard to all the others, I think our  
12 global position on the nature of the case we've already  
13 articulated and the Court understands.

14 THE COURT: Okay, okay. So now sub 3, "Retaliation",  
15 on Page 20, defendants, any objection?

16 ATTORNEY SCHROEDER: Yes, Your Honor, not in  
17 subsection "Retaliation", but further down in "Protected  
18 Activity", 3.1 on Page 20. The second paragraph, "The parties  
19 have agreed on the first element: that Dr. Porter made a  
20 reasonable accommodation request", I think that's -- well,  
21 first of all, "for changes to her work schedule and  
22 environment", those were parts of the things that she asked for  
23 during her, the term of her employment. The Court has already  
24 dismissed those. So I don't think this is one that we've, that  
25 it would be -- we could say that she's made a reasonable

1 accommodation request and leave it at that.

2 THE COURT: Okay.

3 ATTORNEY SCHROEDER: The second point is in 3.2,  
4 "Aware of Activity". Once again, this is not about work  
5 schedule or environment. It's made a reasonable accommodation  
6 request. I would delete the rest of that sentence and put the  
7 following: "Seeking reassignment to the OB/GYN department or  
8 radiology department", period. And that's consistent with the  
9 evidence in the record.

10 THE COURT: Okay. And so are you saying then that  
11 the parties are in agreement on the second element with those  
12 proposed changes; is that the idea?

13 ATTORNEY SCHROEDER: No, no, I didn't suggest, I  
14 didn't suggest that plaintiff's counsel agree to it. I'm, I  
15 bet I can predict that they would be fine with keeping it as  
16 is, but I would submit that that is what this case is about and  
17 that, therefore, we're only dealing with termination on  
18 accommodation and whether or not there is a position available  
19 for her, available position available at the time that the REI  
20 division was closed.

21 THE COURT: All right. "Adverse action", 3.3?

22 ATTORNEY SCHROEDER: With respect to that one, Your  
23 Honor, this is the point we raised earlier, and I'm not going  
24 to belabor it. We would just have it state, instead of that we  
25 agree to that element, just that, in conjunction with the



1 closure of the REI division, Dartmouth Health terminated Dr.  
2 Porter along with two other physicians, and whether it says  
3 "along with two other physicians", I don't think we want to say  
4 adverse employment action. I would just say terminated her  
5 employment.

6 THE COURT: That's the language of the law, though,  
7 isn't it, adverse action?

8 ATTORNEY SCHROEDER: I think it's easier for a jury  
9 to understand what the law is based on that, but I'd defer to  
10 the Court on that.

11 THE COURT: And the closing of the REI division, it's  
12 kind of similar to an objection you made earlier that kind of  
13 goes to the legitimate --

14 ATTORNEY SCHROEDER: Understood.

15 THE COURT: I know. Kind of you have similar  
16 arguments, and I have similar responses, so --

17 ATTORNEY SCHROEDER: I just have to put them on the  
18 record, Your Honor.

19 THE COURT: No, I totally understand that.  
20 Mr. Jones, did you have any comments on these?

21 ATTORNEY JONES: No. We were content with the  
22 language as it was. I do think adding that language, "in  
23 conjunction with the closure of the REI division" makes it very  
24 one-sided and it becomes inaccurate in terms of the nature of  
25 plaintiff's claim.

1 THE COURT: Okay. "Causal connection", 3.4?

2 ATTORNEY SCHROEDER: In the second paragraph of 3.4,  
3 Your Honor, we would delete the first sentence. I think it, it  
4 confuses it for the jury because it gets away from the but-for  
5 standard for the ADA claims. I think the rest of the paragraph  
6 reads well and actually is consistent, but I don't think that  
7 the first sentence of that paragraph is appropriate.

8 THE COURT: Okay. And that's related to the argument  
9 you made earlier about causation, the but-for standard?

10 ATTORNEY SCHROEDER: Correct, Your Honor.

11 THE COURT: Okay, all right. The Rehabilitation Act  
12 claim, so, as you can see, it's a shortened section just  
13 because of how it follows the ADA. So, plaintiffs, no  
14 objections, I'm assuming, to that?

15 ATTORNEY JONES: Correct.

16 THE COURT: Okay. And, Mr. Schroeder, how do you  
17 want to do this with respect to the Rehab Act? Are you  
18 basically the same objections that you raised to the ADA you  
19 raise to the Rehab Act section?

20 ATTORNEY SCHROEDER: Exactly, Your Honor.

21 THE COURT: Okay, all right. Then "Disability  
22 Discrimination Claims Under New Hampshire State Law", Page 22,  
23 plaintiff, any objections?

24 ATTORNEY JONES: No objection.

25 THE COURT: Okay. And defendants?

1 ATTORNEY SCHROEDER: Nothing.

2 THE COURT: Okay. "Disability Discrimination Claims  
3 Under Vermont State Law", Page 22, plaintiff?

4 ATTORNEY JONES: No objection

5 THE COURT: Okay. Defendants?

6 ATTORNEY SCHROEDER: Your Honor, our submission would  
7 be just an objection for the record on whether or not it should  
8 be motivating factor versus but-for. So we're just stating  
9 that objection for the record.

10 THE COURT: Okay. But no, no specific changes other  
11 than that objection to that particular legal standard?

12 ATTORNEY SCHROEDER: Correct, Your Honor.

13 THE COURT: Okay, okay. "Wrongful Discharge under  
14 New Hampshire Law", Page 24, plaintiff, any objection?

15 ATTORNEY JONES: No objection, Judge.

16 THE COURT: Okay. Defendants?

17 ATTORNEY SCHROEDER: Just a second, Your Honor.

18 THE COURT: Yes.

19 ATTORNEY SCHROEDER: Your Honor, we'd submit that the  
20 third paragraph on Page 24 that that's really what should be  
21 above the paragraph on the prevailing rule. Because,  
22 otherwise, if you read the prevailing rule section first, it  
23 looks like there's only one element, and we want to make sure  
24 that the jury is aware there's two.

25 THE COURT: Okay. So no objection to the substance

1 of the paragraph that contains the elements, just where it's  
2 located?

3 ATTORNEY SCHROEDER: Yes.

4 THE COURT: Plaintiff, any objection to moving that  
5 around?

6 ATTORNEY JONES: I mean, I think it makes sense as it  
7 currently is if it's kind of a background of the nature of  
8 at-will employment and that there are exceptions to that nature  
9 of employment, and then it explains that one of those  
10 exceptions is this bad faith exception that is then explained.  
11 I think it makes logical sense the way it currently reads. I  
12 think that actually would be more confusing if it's altered the  
13 way that Mr. Schroeder suggests.

14 THE COURT: Okay. I'm going to leave it the way it  
15 is for now, and we'll also take another look at that after  
16 reading all of them together. Number 1, "Termination motivated  
17 by bad faith, malice, or retaliation", Mr. Schroeder?

18 ATTORNEY SCHROEDER: On that one, Your Honor, the  
19 first element, the first subparagraph, little I, I don't -- I  
20 think that's circular, "an employee is discharged for pursuing  
21 policies condoned by the employer"? I'm not -- maybe I'm,  
22 maybe I'm misreading that, but I'm not sure if that's what was  
23 meant there.

24 THE COURT: So you're saying little I is circular?

25 ATTORNEY SCHROEDER: I'm going to remove that

1 objection, Your Honor.

2 THE COURT: Okay, all right.

3 ATTORNEY SCHROEDER: Nothing else in subparagraph 1  
4 at all.

5 THE COURT: Okay. Subparagraph 2, "Acts that public  
6 policy would encourage", plaintiff, any objection to that?

7 ATTORNEY JONES: No objection.

8 THE COURT: Okay. Defendants?

9 ATTORNEY SCHROEDER: Your Honor, I think it's on Page  
10 26. There's a couple of examples of what could be, you know,  
11 what could be considered acts that public policy would  
12 encourage, but I think it's prejudicial to then say after the  
13 third example, "Other examples of acts that public policy would  
14 encourage could be reporting physician conduct that is illegal,  
15 fraudulent, unethical, or unlawful to patients; ensuring that a  
16 medical provider or medical facility obtain patient consent  
17 before performing procedures on patients; and objecting to  
18 improper patient billing procedures".

19 We would agree to the first three examples, but I think  
20 now we're getting into how the jury is going to interpret the  
21 evidence in the record and apply it to the law. I think now we  
22 are getting into multiple examples beyond the three that are  
23 there, and I think that would be unfairly prejudicial to us.

24 THE COURT: And, obviously, these acts are this case,  
25 right?

1 ATTORNEY SCHROEDER: I'm not suggesting they aren't,  
2 Your Honor.

3 THE COURT: No, no. I understand that. I understand  
4 that. I'm just wondering if part of the objection is the  
5 example begins to become too much about the facts of this case,  
6 which may not be improper, but that's part of your objection,  
7 presumably?

8 ATTORNEY SCHROEDER: Correct, that, that we are  
9 getting into the nitty-gritty of what we're alleging, and, if  
10 we're not going to get into the REI division closing and three  
11 physicians terminated at the same time, well, I'd submit that  
12 we can't get into this specific issue, which obviously is part  
13 of the plaintiff's case.

14 THE COURT: Yeah, but, again, we're going to go round  
15 and round, you know, on this, but that's, that wouldn't be an  
16 act that public policy would encourage, the closure of the  
17 division, right?

18 ATTORNEY SCHROEDER: I agree with you, Your Honor,  
19 except that that's the fourth, fifth, sixth example. I don't  
20 think we need to give the jury six examples. I think there's  
21 three already, and I think that it's unfairly prejudicial of  
22 our case.

23 THE COURT: Okay. Plaintiff, any response?

24 ATTORNEY JONES: We think it's simply a description  
25 of the claim and it's appropriate, and we would note that the

1 sentence starts, "Other examples of acts that public policy  
2 would encourage could be". I mean, you're not saying it is; it  
3 could be. And it just simply summarizes the claim made. So I  
4 think it's okay as written.

5 THE COURT: All right. I'll take a look at that.  
6 "Damages", Page 26, plaintiff?

7 ATTORNEY JONES: No objection.

8 THE COURT: And defendants?

9 ATTORNEY SCHROEDER: We would strike the second  
10 bullet point at the bottom of Page 27.

11 THE COURT: That's a different section, right? I was  
12 just talking about the first paragraph.

13 ATTORNEY SCHROEDER: Oh, I'm sorry, Your Honor.

14 THE COURT: Yeah, "Damages" on 26, 27?

15 ATTORNEY SCHROEDER: No, no objection, Your Honor.

16 THE COURT: So the next section, "Economic and  
17 Non-Economic Damages", plaintiff, any objections?

18 ATTORNEY JONES: No objection.

19 THE COURT: Okay. Go ahead, Mr. Schroeder, on this  
20 section.

21 ATTORNEY SCHROEDER: Sure. The first bullet point  
22 and the third bullet point we would have it state that Dr.  
23 Porter "may be entitled to damages" as opposed to "is entitled  
24 to damages", and we would strike the second bullet because  
25 there has been no evidence put forth in the record about

1 medical care and treatment relating to her claims. There's  
2 just no --

3 THE COURT: Yeah, I was going to ask about that. I  
4 mean, this is obviously coming from a, you know, more general  
5 charge relating to these kinds of damages, so I appreciate that  
6 information.

7 ATTORNEY SCHROEDER: Understood.

8 THE COURT: Is there any objection to that?

9 ATTORNEY JONES: No objection. There's no claim here  
10 for medical expenses.

11 THE COURT: So then the second bullet will be  
12 removed. And the first, Mr. Schroeder, your objection to the  
13 first bullet is "may be entitled"

14 ATTORNEY SCHROEDER: Yes, the same as the third, Your  
15 Honor.

16 THE COURT: So what about above, in the paragraph  
17 right above it, "These damages may include compensation for  
18 past and future harm, depending on the evidence", doesn't that  
19 kind of make the point that it's certainly not required, but  
20 it's based on the evidence in the case?

21 ATTORNEY SCHROEDER: Your Honor, it's a fair point.  
22 I just, I think I just want to make sure they understand that  
23 it's not a fait accompli.

24 THE COURT: Okay. So, for the reason that I've just  
25 said, I'm just going leave it, the first bullet, as "Dr. Porter



1 is entitled" because I think the paragraph before makes the  
2 point that damages are not required. The third bullet,  
3 anything there?

4 ATTORNEY SCHROEDER: Just the same suggestion as  
5 before, Your Honor, "may be".

6 THE COURT: Okay. The "is entitled" language?  
7 Mr. Schroeder, I was just confirming.

8 ATTORNEY SCHROEDER: I'm sorry. I didn't hear you,  
9 Your Honor.

10 THE COURT: Okay. The third bullet, your objection  
11 is to the "is entitled" language?

12 ATTORNEY SCHROEDER: Right, correct, Your Honor. I'm  
13 sorry. I didn't hear you.

14 THE COURT: All right. Okay. "Mitigation of  
15 Damages", Page 28, plaintiff, any objections?

16 ATTORNEY JONES: No objection.

17 THE COURT: Okay. Defendants?

18 ATTORNEY SCHROEDER: Your Honor, in the first  
19 sentence as well as the sentence, "If you find", we would just  
20 -- the first sentence -- well, let's start with the first  
21 sentence. It's Dartmouth Health's position that Dr. Porter has  
22 mitigated or could have fully mitigated her damages. It's not  
23 that she's failed to mitigate or minimize. We know she's  
24 mitigated some of her damages, if not all of them. In fact, we  
25 believe, based upon the demonstrative that we want to show that

1 we talked about before, that she has mitigated all of her  
2 damages. So stating that she has mitigated or could have fully  
3 mitigated her damages would be appropriate there.

4 THE COURT: Sorry. Has mitigated or --

5 ATTORNEY SCHROEDER: Could have fully mitigated her  
6 damages.

7 THE COURT: Mr. Jones?

8 ATTORNEY JONES: I mean, I'm not sure I understand  
9 that so I'm not sure the jury would understand it. I mean, the  
10 way this is phrased is the law of the duty to mitigate. So  
11 then rephrasing it as the defense claims that she mitigated her  
12 damages, that just seems illogical.

13 THE COURT: Yeah, it does seem to be -- I don't know  
14 about illogical, but I don't know if it works given that this  
15 section is all about the duty to mitigate and we're saying  
16 Dartmouth Health claims that Dr. Porter did mitigate.

17 ATTORNEY SCHROEDER: Well, I think we put -- the  
18 evidence in the record is clear, at least from our standpoint,  
19 that, based upon her ability to get this other job right away,  
20 have it right away, that she had mitigated her damages, and, in  
21 fact, if you compared her at a 1.0 FTE at Dartmouth Health,  
22 which is how her expert assumed it, and you did the same for  
23 UVM Medical Center, she's actually making more money as of 2025  
24 going forward.

25 So we are making the -- we're not suggesting that she

1 hasn't mitigate her damages. We believe she's fully mitigated  
2 her damages, to the extent that there were any.

3 THE COURT: Okay. Mr. Jones?

4 ATTORNEY JONES: I mean, that sounds like an argument  
5 that they're making that she has not suffered damages, which I  
6 think is somewhat different than the mitigation issue. I do  
7 think it's important to have something about the mitigation  
8 issue, however, in an instruction because a big part of this  
9 case, you know, their argument that she suffered no losses or  
10 has fully mitigated her damages assumes that she should have  
11 been working a full-time position. We argue that for her to do  
12 a full-time FTE at University of Vermont would have required  
13 her to relocate, and that's not reasonable, and the duty to  
14 mitigate doesn't require that.

15 So I think we need to be able to argue to the jury what  
16 the duty to mitigate is, what it requires, what's reasonable,  
17 what is not reasonable, and to explain to the jury that her  
18 actions exceeded any duty to mitigate that she had and she  
19 still suffered significant financial loss.

20 THE COURT: Okay. I'm going to leave it as worded  
21 right now. Anything else in that section? I think that -- was  
22 that the only objection from the defendants?

23 ATTORNEY SCHROEDER: Yes.

24 THE COURT: Okay. Next section, Page 29, "Punitive  
25 Damages", plaintiff?

1 ATTORNEY JONES: No objection.

2 THE COURT: Okay. Defendants?

3 ATTORNEY SCHROEDER: Yes, Your Honor. I think that  
4 we would suggest halfway down in the, where it says second,  
5 well, "Second", comma, halfway down it says, "You may also find  
6 malice even if Dartmouth Health's motivation behind the  
7 intentional, outrageous conduct was to benefit itself". We  
8 would add "in a way tantamount to a crime" rather than "to harm  
9 Dr. Porter".

10 THE COURT: So the fact that the second paragraph in  
11 that section lays out this "to a degree of outrage frequently  
12 associated with a crime", that's not sufficient?

13 ATTORNEY COFFIN: If I might, Your Honor.

14 THE COURT: Yes.

15 ATTORNEY COFFIN: The concern there is that to  
16 describe that punitive damages are appropriate where Dartmouth  
17 Health has done something to benefit itself, you know,  
18 obviously, a legitimate business reason, part of the reasons  
19 they're doing that is to benefit the institution, and we just  
20 thought that that needed a little bit more elaboration, that  
21 the benefit has to be something, you know, commensurately  
22 outrageous, immoral, like a, tantamount to a crime.

23 The "tantamount to a crime" language, there's nothing  
24 magic about that, but I do think that, if you just leave that  
25 implication that a benefit could be, Hey, if they benefit, that

1 could be subject to punitive damages, is not the law.

2 THE COURT: Okay. So the proposal then is "in a way  
3 tantamount to a crime" rather than "to harm Dr. Porter"?

4 ATTORNEY COFFIN: Yes.

5 THE COURT: Okay. Mr. Jones?

6 ATTORNEY JONES: We believe that the language as  
7 written is appropriate. The second paragraph already provides  
8 for the basic standard, which concludes the language up to a  
9 degree of outrage, frequently associated with a crime. I don't  
10 think that needs to be reinforced here. So we would stick with  
11 the language as drafted.

12 THE COURT: Is the "in a way tantamount to a crime"  
13 linked to the outrageous conduct or to the benefit? Is your  
14 idea that it's both?

15 ATTORNEY COFFIN: Sort of both, but I think that the  
16 notion fundamentally more, if you can split it, is that the  
17 receiving a benefit in those circumstances in that context  
18 would be extreme bad behavior rather than, you know, reasonable  
19 business behavior which benefits the company.

20 THE COURT: Okay. I'm just going to leave that the  
21 way it is for now and, again, take that under consideration.  
22 "Remaining Damages Issues", plaintiff?

23 ATTORNEY JONES: No objection.

24 THE COURT: Okay. And defendants?

25 ATTORNEY SCHROEDER: Just, Your Honor, before you get

1       there, at the last part of "Punitive Damages", the  
2       second-to-last paragraph had a provision, "Where the management  
3       of the corporation has knowledge of wrongful conduct by  
4       lower-level employees, the corporation may be deemed to have  
5       permitted the conduct", we don't believe that that's consistent  
6       with Vermont law on punitive damages. Specifically, the issue  
7       of punitive damages in this case only comes up in the context  
8       of the ADA and, obviously, the Rehab Act then because of the  
9       ADA, but there's a cap limit.

10       There are a couple of cases under Vermont law,  
11       specifically *Shortle v. Central Vermont Public Service*  
12       *Corporation, Sparrow v. Vermont Savings Bank*, which relate to  
13       -- and these were not FEPA claims, but they go to the issue of  
14       punitive damages and whether or not the malicious or unlawful  
15       act relied upon is that of a governing officer. So just  
16       saying, Well, the management of the corporation knew what  
17       somebody was doing, I think that has kind of watered down the  
18       standard of what it takes to hold a corporation liable for  
19       punitive damages.

20       THE COURT: Okay. And do you have citations for your  
21       cases?

22       ATTORNEY SCHROEDER: I do, Your Honor. 137 Vt. 32,  
23       and 95 Vt. 29. That's a rather old case from 1921. The first  
24       one is *Shortle v. Central Vermont Public Service Corp.* That's  
25       from 1979. These are not FEPA claims, but they go to the issue

1 of punitive damages and when they may be assessed against a  
2 corporation.

3 THE COURT: Okay, all right. I'll take a look at  
4 those cases. And then is there a proposal for that particular  
5 sentence?

6 ATTORNEY SCHROEDER: My, the proposal, Your Honor, is  
7 to delete that sentence.

8 THE COURT: Oh, delete it? Okay, all right. And  
9 "Remaining Damages Issues", plaintiff, any objection?

10 ATTORNEY JONES: No objection.

11 THE COURT: Okay. Defendants?

12 ATTORNEY SCHROEDER: No objection.

13 THE COURT: "Insurance and Taxes", plaintiff?

14 ATTORNEY JONES: No objection.

15 THE COURT: Okay. Defendants?

16 ATTORNEY SCHROEDER: No objection.

17 THE COURT: "Final Instructions", plaintiff?

18 ATTORNEY JONES: Not an objection but just a  
19 suggestion.

20 THE COURT: Yes.

21 ATTORNEY JONES: I think it would be best if we could  
22 clarify that the jury is expected to answer "yes" or "no" with  
23 regard to each of the Roman numeral I through VI items on the  
24 form. I just want to avoid a situation where the jury answers  
25 some of them and not all of them and then there's confusion

1 about what the jury did.

2 THE COURT: Okay. So are you saying the third line  
3 of that section, "The answer to each question" should be more  
4 specific about, like, listing the actual issues?

5 ATTORNEY JONES: Well, I might -- I have here my  
6 handwritten notes are to add a fourth sentence. After saying,  
7 "The answer to each question on the form must be the unanimous  
8 answer of the jury", I would say, "In addition, each question  
9 numbered Roman numeral I through VI must be answered".

10 THE COURT: Okay. Defendants, any objection to that?

11 ATTORNEY SCHROEDER: Just a second, Your Honor.

12 THE COURT: Yes.

13 ATTORNEY SCHROEDER: No issue, Your Honor.

14 THE COURT: Okay. So we'll add that. And everything  
15 else with the "Final Instructions" section, no objections?

16 ATTORNEY JONES: Yeah, correct, no further  
17 objections.

18 ATTORNEY SCHROEDER: Yes, Your Honor.

19 THE COURT: Okay, all right. Let's turn to the  
20 verdict form then. So I'll just take, I guess, objections from  
21 each side all at once. Seven-page document. Plaintiff have  
22 any objections?

23 ATTORNEY JONES: No objections.

24 THE COURT: Okay. Defendants?

25 ATTORNEY SCHROEDER: Yes, Your Honor.



1 THE COURT: Okay.

2 ATTORNEY SCHROEDER: With respect to Roman Numeral I,  
3 we would delete the phrase, "and failed to reassign her to  
4 another position at Dartmouth Health", for all the reasons  
5 we've stated previously.

6 THE COURT: Right.

7 ATTORNEY SCHROEDER: There are no changes to Roman  
8 numeral II. Roman numeral III, "Rehabilitation Act", we would  
9 insert the word "intentionally".

10 THE COURT: Before "terminated"?

11 ATTORNEY SCHROEDER: Yes. Because the Rehabilitation  
12 Act requires intentional violation. That's the *Loeffler v.*  
13 *Staten Island University Hospital* decision from the Second  
14 Circuit, 582 F.3d 268. So we would insert the word  
15 "intentionally" in each subparagraph A, B, and C.

16 THE COURT: Even though the legal instructions  
17 section for them to make the finding lays that out?

18 ATTORNEY SCHROEDER: From the jury instructions, Your  
19 Honor?

20 THE COURT: Yes.

21 ATTORNEY SCHROEDER: Well, I think, you know, there's  
22 one thing to go through 30 pages of jury instructions and then  
23 you've got the verdict form. So I think, you know, I think  
24 saying it more than once would be appropriate, especially since  
25 that's what the law requires.

1 THE COURT: Okay.

2 ATTORNEY SCHROEDER: Ms. McDonald just referred to  
3 the fact that she did not believe that the jury instructions  
4 actually refer to the word "intentionally".

5 THE COURT: Okay.

6 ATTORNEY SCHROEDER: In Roman numeral IV, I think --  
7 and this is a continuing rephrasing of subparagraph B for Roman  
8 numeral IV and Roman numeral V. we would just have it say,  
9 instead of "by reassigning her to another department instead of  
10 terminating her employment", we would have it say "by  
11 terminating her employment instead of reassigning her in  
12 violation of the law", so by terminating her employment instead  
13 of reassigning her in violation of whatever law we're talking  
14 about, whether it's Roman numeral IV or Roman numeral V.

15 And we, certainly like the jury instructions, we'll send  
16 Your Honor, too, red-lined provisions.

17 ATTORNEY McDONALD: In the punitive damages question,  
18 Section 3, where it states, "If you checked 'yes' to any of the  
19 questions in parts 2, 4, or 5 above", we would strike the Roman  
20 numeral IV.

21 THE COURT: Yes, I had a feeling you might say that,  
22 but please go ahead, let me hear why.

23 ATTORNEY McDONALD: We don't -- we believe that's a  
24 New Hampshire claim. We don't believe that punitive damages  
25 are available under that claim.

1 THE COURT: Right. So we found the same, but there  
2 is a -- what's the term of art for it -- kind of like excess  
3 compensatory damages under New Hampshire law.

4 ATTORNEY VITT: I think it's enhanced.

5 THE COURT: Enhanced, that's it, enhanced  
6 compensatory damages. The legal distinction between the two,  
7 there must be one, but I think, as I understand it from the  
8 law, that's kind of New Hampshire's kind of way of getting at  
9 that concept.

10 ATTORNEY McDONALD: It's, we do have a case, and it's  
11 *State v. Hynes*, which is 159 N.H. 187, a 2009 case, and at Page  
12 198 there's a quote, "Enhanced compensatory damages are, as  
13 their name indicates, compensatory and not punitive in nature".

14 THE COURT: Yeah. So what's the difference between  
15 punitive damages and enhanced compensatory damages, or what's  
16 the difference between compensatory damages and enhanced  
17 compensatory?

18 ATTORNEY SCHROEDER: Well, I think compensatory goes  
19 the issue of back pay, front pay. Perhaps you add emotional  
20 distress in there. But it certainly doesn't include the  
21 category of punitive, which has its own standard no matter what  
22 state we're in, and compensatory is always considered looking  
23 back and saying, all right, How do we -- whether it's back pay,  
24 front pay, reimbursement for expenses, it is not anything  
25 that's, quote, unquote, punitive.

1 THE COURT: Okay. Mr. Jones, any thoughts on that?

2 ATTORNEY JONES: Well, admittedly it's been a while  
3 since I did extensive research into the New Hampshire law of  
4 enhanced compensatory damages. My recollection -- and my first  
5 bar license was in New Hampshire -- is that this really is New  
6 Hampshire's attempt to get at a similar notion that, in cases  
7 involving particularly egregious behavior, there is the ability  
8 to have the jury award an extra amount to take that into  
9 account, and they call that enhanced compensatory damages.

10 THE COURT: That was kind of my understanding as well  
11 with some research this morning on this. This came up for me  
12 this morning, so that's why the form you have didn't even make  
13 that change to it. But, Ms. McDonald, do you --

14 ATTORNEY McDONALD: I was just going add. I think  
15 also enhanced compensatory damages relate to they're in lieu of  
16 an administrative fine, right? So I think the amount, that  
17 goes to the amount of the --

18 THE COURT: So you're looking at the statute?

19 ATTORNEY McDONALD: Yes.

20 THE COURT: So I'm at the same provision, "Except  
21 that in lieu of an administrative fine, enhanced compensatory  
22 damages may be awarded when the court finds the respondent's  
23 discriminatory conduct to have been taken with willful or  
24 reckless disregard of the charging party's rights under this  
25 chapter".

1           Seems kind of cognate of punitive to some degree. I'm not  
2       saying they're the same, but it seems like New Hampshire's way  
3       of getting at similar type conduct. But we're looking at this,  
4       and I will make an adjustment to that and any necessary kind of  
5       adjustments to the jury instructions in that regard. Is that  
6       it for the verdict form, defendants?

7           ATTORNEY SCHROEDER: Yes, Your Honor.

8           THE COURT: Okay. And, plaintiffs, you're good with  
9       it?

10          ATTORNEY JONES: We are, yes.

11          THE COURT: Okay. So the motions, then, filed over  
12       the weekend. So, first, taking up Document 266, defendant's  
13       memorandum regarding law applicable to a potential award of  
14       prejudgment interest, I'm wondering if this is kind of mooted  
15       out just because you have probably seen the instructions say  
16       that interest is not to be taken into account?

17          ATTORNEY COFFIN: Yes, that was our understanding,  
18       Your Honor, and they've agreed to that instruction, so this  
19       would be mooted out.

20          THE COURT: Okay, thank you. And then the other one,  
21       267 filed by plaintiffs, so motion to preclude any reduction of  
22       damages based on conditional offer of severance pay. So what  
23       is the request here, right? So I understand your argument,  
24       certainly, right, that her decision to forego a severance  
25       agreement or severance payment in favor of proceeding with

1 legal claims means she made her decision and that is her  
2 decision and she shouldn't be, you know, any award of damages  
3 she might receive in this case shouldn't be reduced by that  
4 amount. Is that --

5 ATTORNEY JONES: Correct. And we want to make sure  
6 that there's no argument that, as a matter of mitigation of  
7 damages, that somehow the duty to mitigate would have required  
8 her to accept a severance payment when that would have required  
9 her to sign a general release of all her claims. And the idea  
10 that you have to sign a separation agreement with a general  
11 release to comply with the duty to mitigate would seem to be  
12 legally contrary, and so I think that would be confusing if  
13 that were allowed to be an argument to the jury, that the duty  
14 to mitigate somehow required her to or that she should  
15 otherwise somehow be penalized and that the damage award should  
16 be reduced by what she would have been offered.

17 Had she accepted a severance payment without a general  
18 release, then obviously that payment would be a reduction of  
19 her damages, but in this case the fact that she was offered it  
20 in exchange for a general release we don't think should be used  
21 in argument to the jury as a way to offset, reduce, or  
22 otherwise be a part of the duty to mitigate.

23 THE COURT: Okay. So this is not a request for any  
24 kind of an instruction, it is more of a statement about what  
25 you think they should be able to argue at closing relative to

1 this?

2 ATTORNEY JONES: Correct.

3 THE COURT: So, defendants, so your response is all  
4 about Rule 408. I'm not sure that this is really a Rule 408  
5 question so much as it is mitigation. 408, right, as I  
6 understand it, is just about you shouldn't be introducing  
7 evidence of settlement. I understand the severance issues are  
8 in evidence.

9 ATTORNEY COFFIN: Yeah, I wasn't sure exactly what  
10 they were seeking, and so we responded substantively. One, the  
11 information was admitted without any kind of an objection by  
12 them and without any kind of request that it be so limited. I  
13 think, at that point, the parties are able to point to the  
14 evidence before the jury and present the matter and reasonable  
15 inference is drawn from the evidence in the case, including  
16 damages and including mitigation. They did offer and question  
17 witnesses following up on that with regard to the contours of  
18 the severance and what's normal in a severance situation and so  
19 forth.

20 Furthermore, we've cited in that memo two cases that  
21 discuss, you know, in very similar circumstances that the 408  
22 does not apply in this context because they are not actually  
23 offers to compromise a dispute. And the Ninth Circuit case we  
24 cited there, *Cassino*, actually found that the offer of  
25 severance could be presented in favor of mitigation.

1           And the Second Circuit case is very similar. It tracks  
2           that and cites it approvingly, the *Tripler* case. So I don't  
3           understand how the evidence being admitted and the jury having  
4           heard testimony about this that damages are, and mitigation of  
5           damages are kind of such a central issue in the case that we  
6           should be limited in reasonably pointing to the inferences that  
7           can be drawn from the evidence in the case.

8           THE COURT: But what are those inferences? I guess  
9           I'm curious what that would look like in closing, right? She's  
10          offered severance. She chooses not to take severance. She  
11          chooses to bring legal claims. Is the argument going to be,  
12          not to put words in your mouth, but is the argument going to  
13          essentially she could have taken the severance agreement, and  
14          that would have reduced her damages? I feel like that's a  
15          tough spot, isn't it, for the plaintiff to be in for you to  
16          argue that when she chose to pursue legal claims instead of  
17          severance.

18          ATTORNEY SCHROEDER: Well, first of all, Your Honor,  
19          there was no objection to the admission of that evidence in  
20          this case. They could have made that argument before. So it's  
21          in.

22          But it also goes to the issue of meeting with the  
23          plaintiff after the letter that went -- actually, she  
24          references it in her letter about going to meet with Aimee  
25          Claiborne to go over whether or not, you know, what's going to



1     happen with her job, and it's a fact that she did not accept  
2     the severance package. They've heard that testimony. I think  
3     that it's, it's -- how I present it, I mean, I think we're  
4     certainly open to present it however we want because it's  
5     evidence in the record.

6             THE COURT: I don't know about that. Truly, I don't  
7     know the answer to that, but to make the argument that she  
8     failed to mitigate because she didn't accept the severance  
9     package, which is her right --

10            ATTORNEY SCHROEDER: No, no, I'm not really getting  
11     -- I'm not saying it for just fact of failure to mitigate, Your  
12     Honor. I think one of the issues is that she had a severance  
13     package on the table. She sought more money, and she didn't  
14     take it, period, full stop. I don't have to get into, Well,  
15     she didn't mitigate her damages. I wasn't going to make that  
16     statement. But the facts in the record, C13 is a document in  
17     the record, and so I certainly feel I have the ability to refer  
18     to the actual language of it.

19            She's already admitted that on the stand, Well, it was a  
20     nominal amount. Well, I mean, that just goes to, you know,  
21     some of our, some of the statements that we'll make  
22     specifically on the issue of she was asking for additional  
23     money at the time in addition to what she had in the letter  
24     that she was sending to a number of individuals, and this was  
25     their response. They did meet with her. They enunciated that

1 there was no position for her. It's all in that document.

2 In addition, at the end of that severance agreement, there  
3 was testimony by Heather Gunnell, the fact that it states that  
4 Beth Todd was already a point, was already working in the  
5 OB/GYN department, was part of the OB/GYN department, and was  
6 assumed back into the OB/GYN department on a full-time basis.  
7 That goes to our defenses, Your Honor. She made complaints  
8 about Dr. Hsu and Seifer. That's in the record. But that  
9 document has already been -- the horse has left the barn on  
10 that. How do we not have the liberty of at least referring to  
11 it, not necessarily to say, Well, she failed to mitigate her  
12 damages?

13 I'm not, I don't need to say that, nor was I planning on  
14 it, but, certainly, referring to the sequence of events and  
15 what the company did, what they were prepared to do in terms of  
16 severance. I mean, this whole case is about intent, right?  
17 Well, they put a severance package on the table. She rejected  
18 it. They said, Okay, you know what? We've reconsidered.  
19 We're going to put \$228,000 on the table for you. How do I not  
20 get to talk about that? This whole case is about intent,  
21 respectfully.

22 THE COURT: I guess the question is just how you go  
23 about using it. I still have questions about that. Mr. Vitt?

24 ATTORNEY VITT: If I may be heard, Judge. Yes, the  
25 severance document was introduced really on the issue of, Was

1       there some offer? It wasn't sort of minimal. But, when they  
2       made this argument, it was stunning. The idea that a defendant  
3       can present a discharged employee with a severance agreement  
4       which requires confidentiality, no disparagement, and a total  
5       waiver of all of her rights and then go to a jury and say, We  
6       offered, whatever it is, a hundred, \$150,000, and that should  
7       be deducted from whatever damages you're going to give her.

8               There is simply no law in the Second Circuit and no law  
9       that we could find that supports that. And, as you said, it  
10      puts the plaintiff in a terrible position. It's absolutely  
11      outside the bounds, and it shouldn't happen. They should not  
12      be able to make that argument.

13             THE COURT: Mr. Coffin?

14             ATTORNEY COFFIN: Mr. Vitt says there is no Second  
15      Circuit case law on this. There is. The *Tripler* case  
16      discusses this, and the *Cassino* case, you know, in very similar  
17      circumstances provides that the offer of severance which wasn't  
18      rejected could be offered into evidence in that case and was  
19      used to mitigate damages. You know, so I do think there is law  
20      on this. I think the cases that he cited for various reasons  
21      just are not factually specific and don't hold, as these two  
22      cases we found do hold, that this evidence is admissible.

23             You know, furthermore, we're not even at that point  
24      because this evidence has been admitted, and I don't see why  
25      it's not proper impeachment of Dr. Bancroft, of the information

1 the plaintiff was telling him and whether that was  
2 cherry-picked or not. And, of course, you know, we have this  
3 version of events from Dr. Bancroft which is highly transmitted  
4 from the plaintiff to him, and, if they're allowed to describe  
5 all of these ramifications of what would happen with her salary  
6 and her position and her pay and her damages, this seems to me  
7 to be totally legitimate cross-examination, which was admitted  
8 and the jury has now heard and it's part of the case, and we  
9 should be able to argue it from there.

10 I don't see prejudice here, at least I've not heard kind  
11 of what the prejudice is other than it is, you know, frankly  
12 powerful evidence that she had a chance to bridge over to a  
13 good position which she had at the time and that it would have  
14 helped her carry through and not have kind of damages in the  
15 case.

16 ATTORNEY SCHROEDER: One other point, Your Honor.  
17 This harkens back to earlier in the case when Dr. Porter was on  
18 the stand. She opened the door to this subject for a lot of  
19 reasons, but one of which was, I had to take a second mortgage  
20 on my home in order to buy this condo in Vermont. So, one, she  
21 opened the door to it. Two, the evidence is in the case.  
22 Like, how do I not have the ability, Your Honor?

23 And, certainly, obviously, I do not want to be interrupted  
24 in my closing argument, not as I'm sure plaintiff's counsel  
25 doesn't want to be interrupted. So I certainly want to deal

1 with this ahead of time. Not to say, I mean, this is a small  
2 part of my closing argument because, obviously, our position is  
3 she's not entitled to any damages, but, based upon the somewhat  
4 all-over-the-map presentation by Dr. Bancroft, how do I not  
5 have the opportunity? How do I not have the ability to refer  
6 to, This is what was on the table. They had this discussion?

7 She said, Nobody talked to me about this. She actually  
8 refers to it in her letter. You know, I don't want to -- this  
9 is going to be a really small part of the presentation because,  
10 like I said, I don't really feel that we need to get into  
11 damages very much, but, certainly, it's part of the case. It's  
12 going to be part of my closing, and the fact that it's in the  
13 case makes it germane to my closing argument.

14 THE COURT: Okay. Well, I'm definitely going to take  
15 -- it's *Tripler*, I believe, is the case that Mr. Coffin cites?  
16 I'm just curious. Is it, procedurally, is it similar? You say  
17 the court there says the evidence of the severance agreement is  
18 relevant to come in for similar purposes, that there are, there  
19 was kind of a, a waiver of the severance in favor of, say,  
20 discrimination claims, and the Court found that the severance  
21 information was still relevant to come in in a case like that?

22 ATTORNEY COFFIN: I think that the *Cassino* case is  
23 more relevant to the facts that the Court is describing. The  
24 Second Circuit case had similar facts, but it cited *Cassino*  
25 approvingly for that proposition.

1 THE COURT: Okay, all right. Well, as you can tell,  
2 I mean, I do have, I have some questions about that. I'm going  
3 to read those cases, and I think I understand both sides of the  
4 argument. Okay. I think that was it as far as motions go.

5 ATTORNEY JONES: Yes.

6 THE COURT: Right?

7 ATTORNEY SCHROEDER: Yes, Your Honor. The only thing  
8 I would ask -- obviously up to your discretion, but I want to  
9 know exactly where my bounds are in terms of my closing  
10 argument.

11 THE COURT: Right.

12 ATTORNEY SCHROEDER: And, if you do need us to come  
13 in early to discuss that, I'd rather know today, but I  
14 understand that you have to consider it, and that is  
15 understandable. I just, I want to make sure that I am  
16 following the Court's instruction.

17 THE COURT: Right. No, I think, if you come in a  
18 little early tomorrow to receive kind of the final version of  
19 the jury charge so you can see where things ended up in light  
20 of the objections that were made, we'll have a talk about that  
21 at that time as well. So I certainly understand your desire to  
22 have kind of guidance.

23 ATTORNEY SCHROEDER: One last point, it's kind of  
24 corollary to that, and I realize, Your Honor, you set aside  
25 only 90 minutes, and so I want to be mindful of that. We would

1 like the opportunity to do a very short PowerPoint  
2 demonstrative of what the evidence we believe shows. And,  
3 obviously, we'd be prepared to show it to the plaintiff's  
4 counsel. We haven't drafted it yet, so there's nothing to  
5 share right now. But a very short PowerPoint which would --

6 You know, one of the demonstratives is the issue of her  
7 pay at 1.0 FTE, which is the document that we've had various  
8 discussions about. We'd like to be able to show that but, in  
9 conjunction with that, a very short PowerPoint that would lay  
10 out some of the facts as we see them and as far as the record  
11 is reflecting them.

12 THE COURT: Okay. So, obviously, plaintiff needs to  
13 see it and determine -- you know, obviously, if you have the  
14 consent of plaintiff, it's kind of an easy issue. In that  
15 regard, it has to, obviously, you know, the standard has to  
16 accurately summarize the testimony and kind of the evidence in  
17 the case. So I'll leave that to you to confer with plaintiff  
18 on it.

19 On the related topic, though, C19, that's the other  
20 exhibit you're talking about, the Dr. Bancroft letter. So I  
21 want to tell you I've reconsidered that issue. I'm not going  
22 to allow it as substantive evidence or as a demonstrative, and  
23 I'm going to read into the record right now why, okay? I've  
24 been able to give this more thought.

25 So, by oral motion during a break in the trial, defendants

1 requested that a handwritten note generated by Dr. Bancroft  
2 during cross-examination be admitted into evidence or,  
3 alternatively, that it be permitted as a demonstrative aid.  
4 That exhibit has been marked as Exhibit C19. The Court ruled  
5 that C19 would not be admitted into evidence but that it could  
6 be used as a demonstrative aid during closing. As I said,  
7 since that ruling, I've had an opportunity to review the  
8 transcript of Dr. Bancroft's testimony pertaining to the  
9 generation of the note, as well as consider the legal arguments  
10 of defendant's counsel for its proposed admissibility.

11 So, as to the factual setting of the generation of this  
12 note, Dr. Bancroft was asked to explain his forecasting of  
13 plaintiff's earnings. As part of the cross-examination,  
14 counsel asked Dr. Bancroft to perform specific calculations  
15 using numbers provided by counsel. Before performing the  
16 requested calculations, Dr. Bancroft disagreed that the  
17 proposed calculations would result in the conclusion counsel  
18 sought to establish.

19 He was directed to perform the calculations anyway.  
20 Dr. Bancroft specifically stated, quote, "I'll do it anyways,  
21 but it's not correct". That's at Page 91 of the transcript,  
22 Lines 1 to 3. He then wrote down the numbers on the paper.  
23 That paper is C19.

24 So, first, I reaffirm the ruling that the handwritten note  
25 will not be admitted as evidence, finding that the note is not



1 admissible as a statement by a party opponent under Rule 801.  
2 Dr. Bancroft is not a party for purposes of Rule 801(d)(2)(A).  
3 The note he generated on cross-examination is also not  
4 admissible under 801(d)(2)(C) as the statement of an agent  
5 authorized to speak on behalf of the party.

6 Courts have been skeptical of the notion that an expert is  
7 an agent of the party who retained them. As one example, I  
8 cite *Kirk v. Raymark Industries*, 61 F.3d 147, Third Circuit  
9 1995. The circumstances of this note do not raise the  
10 reasonable possibility of an adopted admission under the rules.  
11 Defendants have asserted, at the time of the argument last  
12 week, I believe, on this, that it is impeachment evidence.  
13 Defendants may comment on the calculation to argue that the  
14 damage calculations are flawed, but it is not evidence in the  
15 case.

16 As to whether it is proper for the note to be used as a  
17 demonstrative exhibit, as I say, I'm altering the ruling to  
18 find that it may not be used as a demonstrative. The general  
19 rule is that the Court may allow the use of demonstrative aids  
20 such as charts or tables, so long as those charts or tables  
21 accurately summarize the content of the primary testimony and  
22 do not misstate the testimony of the expert witness or  
23 otherwise mischaracterize the expert's opinion.

24 For that I'll cite *Castaldi*, 363 Fed.App'x 761, a Second  
25 Circuit decision from 2009. So here the circumstances of the

1 testimony that resulted in the generation of the note raised a  
2 significant question about whether it accurately summarizes the  
3 testimony. Dr. Bancroft acquiesced in performing the requested  
4 calculations while protesting that the calculations were not  
5 correct. Under these circumstances, I don't think it's  
6 appropriate to permit C19 to be used as a demonstrative  
7 exhibit. Obviously, it was his testimony at the trial, and, if  
8 counsel wants to discuss his testimony on that point, that's  
9 fine. Mr. Schroeder?

10 ATTORNEY SCHROEDER: Your Honor, just on a related  
11 point, with respect to the demonstrative exhibits that the  
12 plaintiff wanted to use in this case, obviously, you've heard  
13 from my partner here, Mr. Coffin, on the issue of the federal  
14 rate of interest versus the state equivalent. For that reason  
15 and that reason among maybe 50 other reasons, then  
16 Dr. Bancroft's chart should not be used as a demonstrative  
17 exhibit in plaintiff's closing because it relies upon the 12  
18 percent interest rate in coming to those calculations among  
19 other things that we've objected to already.

20 THE COURT: Right, but, when an expert is subject to  
21 cross-examination and the cross-examination lays out perhaps  
22 flaws in the analysis, you're saying that's a reason for a  
23 demonstrative aid for the expert's primary testimony on direct  
24 not to come in? I mean, experts are undermined all the time in  
25 their cross-examinations.

1           ATTORNEY SCHROEDER: I understand. This just goes to  
2     the demonstrative exhibit, Your Honor, and whether or not the  
3     plaintiffs can use his chart as a demonstrative in the closing.

4           THE COURT: Right.

5           ATTORNEY SCHROEDER: Since Dr. Bancroft's testimony,  
6     we have put in motions regarding the issue of prejudgment  
7     interest and whether or not, which one should be used. Well,  
8     if they get to put in a chart that includes the 12 percent  
9     calculation embedded into their numbers, how is that not  
10    prejudicial to us?

11          THE COURT: Well, I mean, that was part of kind of  
12    the analysis that he generated. I understand you disagree with  
13    it. This was created on cross-examination with numbers that he  
14    did not even agree were accurate predicates for the  
15    calculations. Arguably, all Bancroft did on the stand was  
16    perform certain calculations with certain numbers. He didn't  
17    draw any conclusions as to what those numbers showed. I think  
18    they're substantively different. Mr. Coffin?

19          ATTORNEY COFFIN: Yeah. So I guess I parsed Dr.  
20    Bancroft's testimony a little differently. First, there was  
21    really only, as I see it, only as to 2025 that he had a  
22    colorable claim to disagree with it. Because all we did was  
23    take the numbers from his chart for three years and divide them  
24    by .75 to equal what the numbers he used would be at 1.0.

25          And I would suggest his protestations that, Oh, that's

1 going to be wrong; Oh, that doesn't make sense; I don't agree  
2 with it, you know, were actually very effective impeachment for  
3 the jury because they could see what was going on with him, and  
4 it was really a credibility assessment that they should be  
5 allowed to make.

6 Nonetheless, that was just for one year and, again, for  
7 sort of a, a reason that didn't have a lot of water to it,  
8 which was, in 2025 for half the year, he used a calculation  
9 before he had adopted the assumption that she would go to .75  
10 in July. So you had sort of like a half year that there really  
11 wasn't a full year at 1.0, and yet the difference in the salary  
12 was something like close to \$50,000. So it was a lot more than  
13 reasonably could be found to have been the difference.

14 You know, I would ask the Court, if we took out year 2025,  
15 could we present our chart with just 2026 and 2027, you having  
16 read the testimony closely? So that's one comment I'd make,  
17 but, overall, I do think it's important impeachment as to him  
18 and what he's about. And, again, we had this rapidly evolving  
19 chart, and we're forced to kind of take assumption after  
20 assumption, you know, a week before trial that just radically  
21 changed by millions of dollars his conclusions, and our remedy,  
22 since we didn't disclose an expert five years ago, is to  
23 cross-examine. Well, I think we should be entitled to that  
24 remedy, Your Honor.

25 And I, so I would sort of ask the Court what the Court's

1 view on our demonstrative chart were we to use 2026 and 2027,  
2 which he didn't have that problem with.

3 THE COURT: Yeah. I mean, it's not really a chart.  
4 That's also part of the problem. It's minimal. It's, it's, he  
5 puts a couple of numbers down with the years next to it. I  
6 don't know how that's kind of a summary of testimony in the  
7 same way that the plaintiff's kind of chart is.

8 ATTORNEY COFFIN: Well, if I might politely push back  
9 on that, Your Honor --

10 THE COURT: Sure.

11 ATTORNEY COFFIN: You know, a chart isn't defined by  
12 having lots and lots of parts and lots and lots of columns.  
13 It's designed by, defined and considered to be useful to the  
14 jury by kind of the information that can import, and, really,  
15 this just shows what two years of his particular earnings. And  
16 we could have done, you know, out ten years, but, you know,  
17 three, we thought, made the point.

18 And so I don't think the fact that the chart is simple and  
19 understandable is the basis for the Court to allow or disallow  
20 it. It's whether it's something that the jury would find  
21 reasonable and probative. So I would suggest that we do be  
22 allowed to use a '26 and '27 year chart. And then sort of my  
23 follow-on is I just want to get clarification on behalf of Don,  
24 I think, which is what I do understand the Court to be saying.  
25 While we can't use the chart, we can still point to

1 Dr. Bancroft's testimony, the Court's, sorry, the Court's  
2 ruling on it; is that correct?

3 THE COURT: Right, right. Yes. No. You're  
4 obviously allowed to talk about what was said on the stand  
5 during cross-examination, but I've ruled on the, on the chart,  
6 on C, whatever, C19. So that will remain the ruling, but it  
7 can be commented on at closing.

8 ATTORNEY COFFIN: All right. Thank you, Your Honor.

9 THE COURT: Okay. Does that cover everything, two  
10 hours later?

11 ATTORNEY JONES: From our perspective, yes, Your  
12 Honor. Thank you.

13 THE COURT: Okay. Defendants, Mr. Schroeder?

14 ATTORNEY SCHROEDER: Yes, Your Honor.

15 THE COURT: Okay, all right. So, as I said, we will  
16 get you a new version of the jury instructions, and why don't  
17 we plan to meet at 8:30, if that works for everyone, tomorrow?  
18 Thank you.

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20 (Whereupon at 3:03 p.m. the hearing was adjourned.)

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1                                   C E R T I F I C A T E

2                                   I, Sunnie Donath, RMR, Official Court Reporter  
3                                   for the United States District Court, District of Vermont, do  
4                                   hereby certify that the foregoing pages are a true and accurate  
5                                   transcription of my stenographic notes of the hearing taken  
6                                   before me in the above-titled matter on April 7, 2025 to the  
7                                   best of my skill and ability.

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*Sunnie Donath, RMR*

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Sunnie Donath, RMR

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